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CHARLES ELMORE C

IN THE

Supreme Court of the United States

No. 491.

J. P. GRUBB, A NATURAL PERSON, ETC.,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO, ET AL.,
Appellees.

BRIEF AND RECORD ON BEHALF OF APPELLANT, AND IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM.

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INTRODUCTION.

This brief and parts of the record on behalf of appellant is in opposition to the motion of appellees to dismiss or affirm.

The appellant proposing to engage in interstate commerce exclusively as a motor bus common carrier for hire among the states of Ohio, Kentucky and West Virginia under the trade name of The Tri-State Transit Company, applied to the Ohio Public Utilities Commission and expressed willingness to obey and comply with Ohio police laws and regulations and pay Ohio taxes governing motor common carriers. Kentucky had granted its permit but the Ohio commission did not know this. West Virginia granted its certificate, but the Ohio commission did not know this. Neither did the Ohio Supreme Court. Section 614-101, Ohio General Code (Appendix) provides that the Ohio act shall not apply nor be construed to apply to interstate commerce. (Clark v. Poor, 274 U. S., 554.) (Magnuson v. Kelly, 35 Fed. (2nd), 867.) (Fed. Reporter of January 6, 1930.) The state court did not decide the federal question, and if it did, the judgment was void, being outside the scope of state power.

In Buck v. Kuykendall, 267 U. S., 307 and 316, a similar motion was made, but this court overruled the same.

Appellees seek to confine the motion to certain particular paragraphs of the bill and amendment thereto. We insist that the court consider the entire bill and amendment thereto. They are printed in the record of appellees, pages 1 to 25 inclusive. We call to the court's attention paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

and 18, and also paragraph 6 of the amendment to the bill. These paragraphs not only raise the interstate commerce question, but also the question of discrimination against Grubb's interstate commerce and in favor of that of The Interstate Motor Transit Company, a competitor, which corporation was granted September 21, 1927, a certificate to go across the same new interstate toll bridge to Kentucky end and turn and come right back. It so operates now and has been. Grubb's Kentucky permit grants him the right to use this bridge to Ohio, while the Ohio commission prohibits. (See Buck case, supra.)

Appellant was served with copy of motion January 6, 1930. Before this the clerk had estimated cost of printing record as per joint designations of all parties. We sent to appellees the clerk's estimate of their part, the clerk suggesting that same be sent through us. They have not sent their part. We had until February 3, 1930, to send deposit to the clerk. We were waiting on appellees. The statement of points and statement as to the jurisdiction have long since been filed. We have not been guilty of delay.

JOHN F. CARLISLE,
FRANK M. RAYMUND,
ANDREW WILSON,
Counsel for Appellant.

IN THE

Supreme Court of the United States

No. 491.

J. P. GRUBB, A NATURAL PERSON PROPOSING TO Operate Interstate, The Tri-State Transit Company,

Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO, William Klinger, James W. Huffman and Frank Maullar, Members of and Constituting Said the Public Utilities Commission of Ohio, The Interstate Motor Transit Company, a Corporation, The Cannonball Transportation Company, a Corporation, The Portsmouth Public Service Company, a Corporation, The Ohio Valley Bus Company, a Corporation, The Ohio Valley Electric Railway Company, a Corporation, Elsa Canter, Sheriff, Scioto County, Ohio, ——— Sheets, Chief of Police of Portsmouth, Ohio, and the Sheriffs of Franklin County, Pickaway County, Ross County, Pike County and Lawrence County, All of Said Counties Being in the State of Ohio, and the Chiefs of Police and Members of the Police Departments of the Cities, Towns and Villages of the State of Ohio, Whose Names are Unknown to the Plaintiff and Too Numerous to Mention,

Appellees.

BRIEF OF APPELLANT CONTRA THE MOTION TO DISMISS OR AFFIRM AND PARTS OF THE RECORD.

HEAD NOTE.

(The letter "R" indicates the part of the record printed and filed by appellees.

The word and letter "appellant R", or the word "Appendix", indicates the part of the transcript of the record, which appellant has had printed as an appendix to this brief against the motion.

The assignment of errors with prayer for reversal and original citation together with other appeal papers and bond were filed with this court November 25th, 1929, along with the transcript of the District Court, this case being docketed at the same time.

The "points and designations", and printed "statements as to the jurisdiction" have also been filed within rule with the clerk of this court.)

THE PARTIES.

The appellant, J. P. Grubb, is a natural person. Prior to January 23, 1928, he had never personally or individually applied for a license, permit or certificate, either intrastate or interstate, to operate a common carrier motor bus line. Between March, 1923, and February 2, 1928, he had been employed by or was a stockholder in two different corporations known as The Cannonball Transportation Company and The Interstate Motor Transit Company. While employed by said corporations he was advised as to what these corporations could legally do in their operations of their motor bus lines between Ohio, Kentucky and West Virginia points by Judge A. Z. Blair, who is one of the counsel for said corporations in this suit, and who was also counsel in Case No. 21098, The Interstate Motor Transit Company, et al., plaintiffs in error v. The Public Utilities Commission of Ohio, Ohio Supreme Court, 119 O. S., 264. (Appellee R., p. 76.)

In his application to the Ohio commission he, personally, under the trade name of The Tri-State Transit Company, proposed to engage in interstate commerce **exclusively** carrying passengers from and to Columbus, Ohio, over U. S. Federal Aid Roads Nos. 23 and 52, via South Portsmouth, Ky., to and from Huntington, West Virginia. Grubb's proposed route was over a new interstate toll bridge over the Ohio river between Portsmouth, O., and South Portsmouth, Ky., which was opened for traffic for

the first time early in September, 1927. The river traffic before this was taken care of by ferry boat. He did not propose to carry any passenger whose whole and complete ride was between Portsmouth, O., and South Portsmouth, Ky., because there were other bus lines and taxicabs that took care of such service. **He was willing to comply with all applicable Ohio uniform police regulations concerning motor bus common carriers, obey Ohio police laws and pay all prescribed taxes.**

The Interstate Motor Transit Company is a corporation, and was then and is now operating a motor bus line in **exclusively** interstate commerce from and to Columbus, O., over U. S. Federal Aid Roads 23 and 52, via South Portsmouth, Ky., to and from Huntington, West Va. It began operation over said new interstate toll bridge between Portsmouth, O., and South Portsmouth, Ky., in September, 1927, by the express certificate of the Public Utilities Commission of Ohio. (See Appendix, Plaintiff's "Exhibit O.") (Also Appendix, Plaintiff's "Exhibit V.")

The Cannonball Transportation Company is a corporation, operating a motor bus line in interstate commerce over U. S. Federal Aid Roads 23 and 52, via South Portsmouth, Ky., from and to Chillicothe, O., from and to Huntington, West Va. It also engages in intrastate commerce operation from and to Columbus, O., via Portsmouth, O., to and from Ironton, O., for the most part over U. S. Federal Aid Roads 23 and 52. It received a permit from the state of Kentucky to operate over said new interstate toll bridge between Portsmouth, O., and South Ports-

mouth, Ky., April 25, 1928. (See Deposition of Kelly, Appendix.)

The Portsmouth Public Service Company is a corporation and operates street cars and busses within the city of Portsmouth, O., but does not operate over or across said new interstate toll bridge between Portsmouth, O., and South Portsmouth, Ky.

The Ohio Valley Bus Company is a corporation and operates a bus line in interstate commerce from Ironton, O., over the bridge there into Kentucky, its operation being about 30 miles up Ohio river from the new interstate toll bridge between Portsmouth, O., and South Portsmouth, Ky.

The Ohio Valley Electric Railway Company is a corporation and at the time this suit was begun was operating street cars on tracks between Portsmouth, O., and Ironton, O., but it never did operate over or across said new interstate toll bridge between Portsmouth, Ohio, and South Portsmouth, Ky., there being no street car tracks in the bridge as plainly appears by Defendant's "Exhibit A", facing page 67 of appellees' printed part of the record.

The Public Utilities Commission is described in paragraphs 2 and 3 of the bill of complaint.

The sheriff and chief of police are described in paragraph 5 of the bill of complaint.

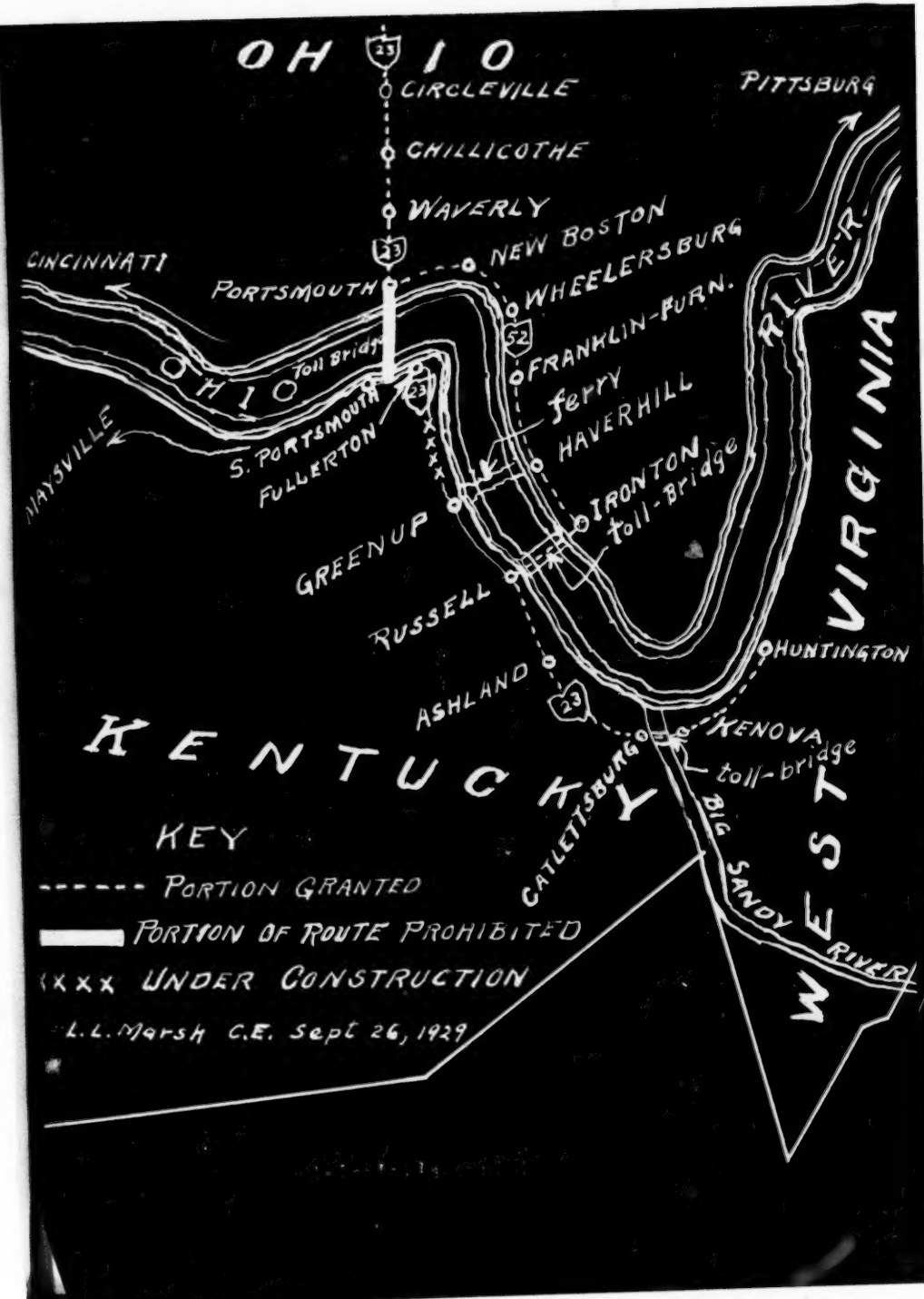
BLUE PRINT MAP SHOWING PART OF THE ROUTE GRANTED AND PART PROHIBITED.

Facing this page is shown a blue print map marked Plaintiff's "Exhibit C", which stipulation has been approved by all counsel, said stipulation being printed in the appendix of this brief. (See appendix this brief.)

This blue print map represents conditions as they existed when Grubb applied to the Ohio commission to engage in interstate commerce **exclusively.**

U. S. Federal Aid Road No. 23 runs from Columbus south and crosses the Ohio river over the new interstate toll bridge to the Kentucky shore, thence east a short distance through Fullerton and then continues up river through Kentucky to Huntington, West Va. **It was then and is now under construction between Fullerton and Greenup.** Said Route 23, coming south, meets U. S. Federal Aid Road 52 in Portsmouth, O. Said Route 52 extends up the Ohio river on the Ohio side to Ironton, O. There is another interstate toll bridge at this point over the Ohio river between Ironton, O., and Russell, Ky. There is still another interstate toll bridge over the Big Sandy river between Catlettsburg, Ky., and Kenova, West Va. **The Ohio state boundary line between Ohio, and Kentucky and West Virginia is low water mark on the Ohio side of the Ohio river.**

The **interstate route** over which Grubb, under the trade name of The Tri-State Transit Company, proposed to operate in interstate commerce **exclusively** between Co-


OHIO
23
CIRCLEVILLE
CHILLICOTHE
WAVERLY
23
NEW BOSTON
WHEELERSBURG
52
FRANKLIN-FURN.
FERRY
HAVERHILL
IRONTON
toll-Bridge
PITTSBURG
RIVER
CINCINNATI
PORTSMOUTH
OHIO
Toll Bridge
23
S. PORTSMOUTH
FULLERTON
MAYSVILLE
GREENUP
RUSSELL
ASHLAND
23
HUNTINGTON
WEST VIRGINIA
KENOVA
toll-bridge
CATLETTSBURG
BIG SANDY RIVER
KENTUCKY
KEY
PORTION GRANTED
PORTION OF ROUTE PROHIBITED
XXXX UNDER CONSTRUCTION
L.L. Marsh C.E. Sept 26, 1929

lumbus, Ohio, via South Portsmouth, Ky., and Huntington, Vest Va., starting from Huntington, West Va., extending down river over U. S. Federal Aid Road 23 through Russell, Ky., to and through Ironton, O., to U. S. Federal Aid Road 52 and continuing down river over said road 52 to U. S. Federal Aid Road 23 through Portsmouth, O., **across said new interstate toll bridge** on U. S. Federal Aid Road 23 to bus terminal at the Kentucky end of said bridge at South Portsmouth, Ky., and then north back across said **new interstate bridge** and continuing on U. S. Federal Aid Road 23 to Columbus, Ohio; then reverse and back to Huntington, West Va., over exactly the same federal aid roads and interstate toll bridges.

The **dotted line** shown on the blue print map from Columbus, O., through Portsmouth, O., to Ironton, O., **shows the part of the route granted by the Ohio commission. The heavy solid line between Portsmouth, Ohio, and South Portsmouth, Kentucky, and which for the most part coincides with the new interstate toll bridge, represents the part prohibited by the Ohio commission.** The dotted line from Huntington, West Va., to the West Virginia-Kentucky line at Kenova shows the part permitted by the State Road Commission of West Virginia, on April 13, 1928. (See Appendix, Plaintiff's "Exhibit M.") The dotted line from Catlettsburg, Ky., through Russell, Ky., to Ironton, O., and the solid heavy line from South Portsmouth, Ky., to Portsmouth, O., shows the part of the route permitted by the Kentucky department of motor transportation which was granted January

30, 1928, revoked April 2, 1928, revived April 3, 1928, and extended April 17, 1928, to April 25, 1928. (See Appendix, Plaintiff's Exhibits "J-1", "J-2", "J-3", "J-4", "J-5", "J-6", "J-7", "J-8", and "J-9.") It will be noted that the state road commission of West Virginia made its order certificating Grubb April 13, 1928, which was after March 13, 1928, on which last mentioned date the hearing was had and record made before the Ohio commission, which record as then made was the only record submitted by error proceedings to the Ohio Supreme Court. The Kentucky department of motor transportation by Permit No. 2204 (See Appendix, Plaintiff's "Exhibit J-3.") granted Grubb to engage in interstate service from the West Virginia-Kentucky line at Catlettsburg through Russell, Ky., to Ironton, O., and from South Portsmouth, Ky., to and through Portsmouth, O. This permit was granted January 30, 1928, and was revoked April 2, 1928; but Grubb did not know this until April 3, 1928, as shown by Plaintiff's Exhibits "J-7", "J-8", and "J-9", Appendix. It was extended to April 25, 1928. This Kentucky permit was not in the record made at the hearing March 13, 1928, nor was it in the record in the error proceedings in the Ohio Supreme Court.

The history of this Kentucky permit and the West Virginia permit is set forth in paragraph 13 of the bill of complaint as the same appears on pages 16 and 17 of appellees' printed record filed in support of the motion. The Public Utilities Commission of Ohio did not know of the Kentucky permit granting Grubb the right to cross

the Ohio river over the new interstate toll bridge from South Portsmouth, Ky., and return,—nor did said commission know of the grant made by West Virginia, for the reason that these new matters took place after the record was made before the Ohio commission on March 13, 1928. Nor did the commission know about the permit from Kentucky and the certificate from West Virginia before it issued its prohibitory order of April 2, 1928. It was the record made before April 2, 1928, and the prohibitory order made thereon that the Ohio Supreme Court had before it for revision in Grubb's error proceeding. Neither did Grubb know about these things, because the Kentucky and West Virginia authorities had not acted. The Ohio commission itself in its answer, filed in the District Court over one year after the case was brought in the District Court, at paragraph 13, as the same appears on page 55 of appellees' printed record in support of the motion, admits that it has no knowledge of the allegations set forth in paragraph 13 of said bill of complaint. The Ohio commission having no knowledge as it alleged, it must follow that the Ohio Supreme Court could have no knowledge, for the reason that it was the record made before this very commission that was submitted to the Ohio Supreme Court and none other.

APPELLANT DENIES THAT THIS APPEAL IS PROSECUTED FOR DELAY ONLY.

A few facts and dates as shown by the file marks on the pleadings and exhibits will show that appellant's prosecution has been affirmatively active from the beginning, and that delay, where there was delay was caused by appellees themselves.

On January 23, 1928, Grubb, **proposing to engage in interstate commerce exclusively**, applied to submit himself to Ohio uniform police regulations, pay taxes and carry insurance.

March 13, 1928, the Ohio commission granted his application as prayed for, effective **April 1, 1928.** On this day all appellees herein were competitor-protestants before the Ohio commission and insisted that there was no interstate public convenience and necessity, that Grubb was not applying in good faith, that he was bankrupt and that he was seeking the so-called certificate to force The Interstate Motor Transit Company, and The Cannonball Transportation Company, to buy him out. **On April 2, 1928**, the commission issued its formal order granting Grubb from Columbus through Portsmouth to Ironton, O., over U. S. Federal Aid Roads 23 and 52, but "**prohibited**" him from incorporating within the route granted the right to go to South Portsmouth, Ky., over the **new interstate bridge over the Ohio river** between Portsmouth, O., and South Portsmouth, Ky., on the ground, that on May 10, 1927, the protesting-competitor, The In-

terstate Motor Transit Company, a corporation, had a joint transfer and tariff arrangement with a Kentucky bus line that came from Kentucky by ferry, **there being no interstate bridge between Portsmouth and South Portsmouth at the time**, and on the further ground that Grubb on said **May 10, 1927**, was president and general manager of said corporation. This order of **April 2, 1928**, was to become effective **May 1, 1928.**

On April 6, 1928, Grubb applied to the Ohio commission to amend the prohibitory part of the order by making it effective April 18, 1928, and to make it read, "granted as prayed for", which was the order as announced **March 13, 1928**, the day of the hearing. The commission amended to make the order effective April 18, but refused to stand by its announced order of March 13, 1928. The Kentucky permit, which was not in evidence before the commission, was limited to 60 days from January 30, 1928, and on April 3, 1928, Grubb was advised by the Kentucky highway commissioner that the **entire Kentucky permit** had been revoked. (Appellant's Exhibits "J-6" and "J-7", Appendix.) Later the Kentucky commissioner revived the permit, extending it until April 25, 1928.

On **April 13, 1928**, West Virginia grants Grubb a certificate to **engage in interstate commerce exclusively.** These new facts as to what Kentucky and West Virginia did **were not in the record made before the Ohio commission March 13, 1928, and which record was later submitted to the Ohio Supreme Court.** On April 17, 1928, Grubb applied to the Ohio commission for a rehearing on

the ground that the prohibitory part of the order of April 2, 1928, was not in accordance with the announced order and decision made by the commission on March 13, 1928. The appellees failed and neglected to introduce in evidence in the District Court this application for rehearing. On April 19, 1928, the corporation-competitor-appellees filed their petition in error against the Ohio Public Utilities Commission in Case No. 21098, (119 O. S., p. 264) for an order of the Ohio Supreme Court reversing that part of the order of April 2, 1928, that granted Grubb from Columbus, O., via Portsmouth, O., to Ironton, O., over U. S. Federal Aid Roads 23 and 52. Grubb was not a party to this proceeding.

On March 31, 1928, the corporation-competitor-protestant-appellees brought an injunction suit against Grubb and the Ohio commission, and on April 7, 1928, served on him a notice that he appear before a notary in Judge Blair's office in Portsmouth, O., April 10, 1928, at 9 a. m. and bring all books and records and data of every kind and description. This suit in Scioto county has not been prosecuted by said appellees at all. These facts were not before the Ohio commission and were never submitted to the Ohio Supreme Court.

THE EQUITY SUIT IN THE UNITED STATES DISTRICT COURT No. 627.

On April 20, 1928, Grubb filed bill of complaint in United States District Court against the Ohio commission, the corporation-protestant-appellees and certain police officers, gave bond, and restraining order is

granted, restraining the commission and the corporation-appellees from arresting or interfering with Grubb in his exclusive interstate operation of a motor bus line from Columbus, O., via South Portsmouth, Ky., to Huntington, West Va., and return. On April 23, 1928, all appellees, excepting the commission are personally served with subpoena and restraining order. On April 25, 1928, the Public Utilities Comission of Ohio and each member thereof are served personally with subpoena and restraining order.

On May 10, 1928, Grubb, with consent of court and counsel, files amendment to bill of complaint. On April 20, 1928, entry granting temporary restraining order filed. (See pages 14 and 15 of transcript of record in clerk's office.) On May 3, 1928, corporation-appellee, The Interstate Motor Transit Company, files its first answer. On October 5, 1928, the district judge sets case for hearing on November 10, 1928.

Between May 10, 1928, and June 8, 1928, the restraining order is kept alive by the district judge, and on June 8, 1928, it is continued in force by entry of the district judge until case heard. On November 10, 1928, The Interstate Motor Transit Company files its amended answer. On November 10, 1928, The Ohio Valley Bus Company, The Portsmouth Public Service Company, and The Cannonball Transportation Company file their answers for the first time, being 4 months out of rule. The Public Utilities Commission of Ohio had filed no answer at all and was 4 months in default. The Ohio Valley Electric Railway filed an answer adopting that of The Ohio Val-

ley Bus Company, but its answer bears no file stamp. On May 7, 1928, in pursuance of deposition notice, appellant went to Frankfort, Ky., to take deposition of Kentucky highway commissioner. During the months of September and October, 1928, trips were made to Columbus, Huntington, and Portsmouth, taking testimony in pursuance of the order of the District Court. On November 10, 1928, a hearing was had before three-judge court, all testimony and exhibits filed, arguments made and the case fully and finally briefed and submitted. On this date the three-judge court took the case on the merits under advisement, the court holding the same without decision until May 18, 1929.

On May 13, 1929, the district judge without the knowledge or consent of appellant, allows the Public Utilities Commission of Ohio to file its answer, although it had been in default for over a year. (Federal Equity 12.) Appellant saved exception in the final entry, and in his assignment of errors at paragraph 17 and in his "statement of points" at point 3. In its answer the commission traverses the bill of complaint and amendment thereto, and by way of new matter sets up the plea of res adjudicata. On May 13, 1929, by leave of court, the corporation-appellees, file separate supplemental answers, setting up the plea of res adjudicata, although as to The Ohio Valley Bus Co., The Portsmouth Public Service Co., and The Ohio Valley Electric Railway Co., there could be no issue because they do not operate across the new interstate bridge to South Portsmouth, Ky., and never did. They had, as plaintiffs in error, joined with The Inter-

state Motor Transit Company, and The Cannonball Transportation Company, in the error proceeding against the commission to set aside the part of the order of April 2, 1928, that granted Grubb from Columbus, O., via Portsmouth, O., to Ironton, O., because as to the part granted they would be competitors of Grubb as to the part of his operation from Portsmouth via Ironton through Russell, Ky. They never were and could not be concerned by or with Grubb's operation over the new interstate bridge to South Portsmouth, Ky. The Interstate Motor Transit Company, and The Cannonball Transportation Company, operated over this new bridge between Portsmouth and South Portsmouth, to and from the bus station at the Kentucky end of said bridge in interstate commerce. In their case in the Ohio Supreme Court, No. 21098, (119 O. S., 264), both before the commission and the Ohio Supreme Court, they did raise the federal question of interstate commerce, but the Ohio Supreme Court said at page 267 that the commission was right,

> "In holding that the questions were federal in character, and must be passed on by the federal authorities, and that the jurisdiction of the commission was very limited and well defined by the decisions with respect to interstate carriers. The protestants outlined in a general way to the commission the character of evidence they wished to offer, and asked to be afforded time to prepare the same so it could be offered; but the commission held and ruled that such evidence would be irrelevant, immaterial, and incompetent for want of jurisdiction of the subject matter.
>
> The protestants then sought to make their case by cross examination of Grubb, covering the same features of the case. This the commission declined

to permit, for the same reasons." (See appellees' printed part of Record, pages 79 and 80.)

On May 18, 1929, the District Court, over the objection of appellant, exceptions saved and noted of record, as appears by the entry on page 246 of the transcript, allowed to be filed and introduced in evidence the mandate of the Ohio Supreme Court, which "affirms" the entire order of the commission of April 2, 1928, **"for the reasons stated in the opinion filed in this case."**

On May 18, 1929, the District Court, three judges sitting, refers to and cites the case in the Ohio Supreme Court as follows:

> "Grubb, etc., and The Interstate Motor Transit Company v. Public Utilities Commission of Ohio, 119 O. S., 264, and asks the question whether the disposition of the case by the Ohio Supreme Court is a bar in this court,—whether that court's judgment is res adjudicata or an estoppel in this court." (See appellees' printed part of Record, bottom page 87 and top of 88.)

At bottom of page 88, the three-judge court uses the following language:

> **"And, although that court in its opinion (119 O. S., 264) failed to deal with the illegality of the commission's action and findings in relation to the constitutional guarantees and limitations, yet the power and duty given it by the statute in such cases and the raising of that by the plaintiff in his pleadings, results in the conclusion that the Supreme Court passed upon all questions that were before it, and its judgment must be interpreted to include a finding that the acts and orders of the commission were such as to not invade the constitutional rights of the plaintiff Grubb."**

It will be noted that the District Court in its opinion expressly said that the Ohio Supreme Court,

> **"failed to deal with the illegality of the commission's action and findings in relation to the constitutional guarantees and limitations."**

It will further be noted that the Ohio Supreme Court in its mandate said that it,

> **"affirmed for the reasons stated in the opinion filed in this case."**

This mandate appears on pages 83 and 84 of appellees' printed part of the record.

On November 14, 1928, the Ohio Supreme Court made its decision, but the appellees, each and all of them delayed and delayed for 6 long months, to wit: from November 14, 1928, until May 13, 1929, before attempting to raise the plea of res adjudicata. Grubb's equity suit in the District Court had been fully and finally heard, argued and briefed, and submitted for decision November 10, 1928, and the three-judge court held it without decision until May 18, 1929, more than 6 long months. In this manner the appellant was kept in suspense, and the District Court by thus allowing the Public Utilities Commission to file its answer more than a year out of rule and the other appellees to file their supplemental answers more than 6 months out of rule, appellant Grubb, if we assume that the state court had decided the federal question, was, by the running of the time, prevented from taking a direct appeal from the state court

to the Federal Supreme Court. **But the District Court said May 18, 1929, that the state court,**

> **"failed to deal with the illegality of the commission's action and findings in relation to the constitutional guarantees and limitations",**

and we for the appellant say that we too had noted that the state court, "failed to deal with the illegality of the commission's action and findings in relation to the constitutional guarantees and limitations", and for that reason we felt that the decision of the state court could not become res adjudicata in the District Court. The state court having failed to deal with the questions of constitutional guarantees and limitations, there was no reviewable federal question or questions for review by the Supreme Court of the United States.

> Union Pac. Ry. Co. v. Laughlin, 247 U. S., 204;
> New Orleans Taxpayers Protective Assn. v. Sewerage & Water Board of New Orleans, 237 U. S., 33.

The reviewable character of the decision of the state court and what was drawn in question and decided is ascertained not only from its judgment but from its opinion.

> Burbank v. Ernst, 232 U. S., 162.

The opinion of the state court may be regarded and considered by the federal Supreme Court as a part of the state record.

> New York, ex rel., Bryant v. Zimmerman, et al., 278 U. S., 63.

On June 19, 1929, the entry dismissing the bill and amendment to bill was filed.

On July 10, 1929, all appeal papers including assignment of errors and prayer for reversal and order allowing appeal and fixing bond was filed.

On July 30, 1929, bond on appeal was filed.

On July 30, 1929, appellees finally got back to counsel for appellant the citation on appeal, they having held the same for twenty days.

Counsel were so widely distributed that they could not be gotten together to arrange the testimony in narrative form, the entire burden falling upon counsel for appellant. Carbon copies of the narrative were immediately mailed to counsel for appellees. When the narrative was finished, the time for preparing which having been enlarged by the district judge, counsel for appellees desired revisions and changes. Counsel for appellant immediately made all such changes and even made for appellees a complete carbon copy of the transcript and sent same to them, thereby saving them trips to Columbus and the time of the district judge in working out conflicts.

On November 25, 1929, the entire transcript, praecipe, points and designations of appellant, designations of appellees, all appeal papers, including the assignment of errors and prayer for reversal, and the original citation, were filed with the clerk of the Supreme Court of the United States.

On December 4, 1929, appellant's printed "statement as to the jurisdiction," showing full service, was filed with the clerk of the Supreme Court of the United States.

The clerk has been over the joint designations of appellant and appellees for the printed record, has estimated the cost, part of which appellees by stipulation in the transcript promised to pay, appellees have been advised as to their portion and have been asked to send the same, and this was the condition of affairs at the time the motion was filed to dismiss charging appellant with delay.

We have until February 3, 1930, seventy days from November 25, 1929, within which to get the deposit to the clerk of the Supreme Court of the United States to pay clerk costs and the expense of printing the record in accordance with the designations of appellant and appellees.

GRUBB'S CASE IN THE SUPREME COURT OF OHIO, No. 21184.

On May 31, 1928, forty-five days after federal jurisdiction had fully attached in Grubb's equity suit in the United States District Court, Southern District of Ohio, Eastern Division, Grubb filed a petition in error against the Public Utilities Commission of Ohio. There were no other parties to this case. Grubb sought to have the state court revise the prohibitory part of the order of April 2, 1928, so that it would agree with the announced order and decision of the commission made March 13, 1928, by which announcement the commission granted Grubb the right to engage in interstate service from Columbus, O., via South Portsmouth, Ky., to Huntington, West Va., and return, over U. S. Federal Aid Roads Nos. 23 and 52.

In said petition in error he further advised the state court of having been granted the right to engage in interstate commerce by the Kentucky highway commissioner from South Portsmouth, Ky., to Portsmouth, O. He did not advise the court as to the certificate from West Virginia, which, with the Kentucky permit, he could carry passengers from Huntington, West Va., to South Portsmouth, Ky., and reverse, over said new interstate bridge. The matter of the Kentucky permit as revived and the West Virginia permit as granted, both being after April 2, 1928, the date he was granted in part and prohibited in part by the Ohio commission, were not in the record made before the Ohio commission March 13, 1928, and therefore were not grounds in the application for a rehearing. Not being in the application for a rehearing they could not be urged as grounds of error in Grubb's petition in error filed in the state court May 31, 1928. Ohio General Code, Section 543, found on page 67 of appellees' printed part of the record, amongst other things provides as follows:

> "No corporation or person shall in any court urge or rely on any ground not set forth in said application for a rehearing."

This was the reason why the District Court in its decision said that the state court

> "failed to deal with the illegality of the commission's action and findings in relation to the constitutional guarantees and limitations."

This is further borne out by the confession of the commission in its answer at paragraph 13 on page 55 of ap-

pellees' printed part of the record, at which paragraph the commission says that it has no knowledge of the Kentucky permit or the West Virginia permit.

Paragraph 6 of Grubb's petition in error, as set forth on page 6 of appellees' brief on the motion to dismiss or affirm, **is completely omitted.** Why appellees omitted this paragraph 6 counsel for appellant cannot explain. In the answer of the Public Utilities Commission appearing on page 58 of appellees' printed part of the record, paragraph 6 of Grubb's petition in error, reads as follows:

> "6. That said part of the order is a violation of and contrary to Section 614-101 of the General Code of Ohio."

Section 614-101 appearing in the appendix as "Plaintiff's Exhibit A-1," reads as follows:

> **"Section 614-101. Neither Section 614-84 to 614-102, inclusive, of the General Code, nor any provisions thereof, shall apply or be construed to apply to commerce with foreign nations or countries, or among the several states of this Union, except in so far as the same may be permitted under the provisions of the Constitution of the United States and the acts of congress."**

Section 614-84 to 614-102 comprehends the motor transportation code of the state of Ohio.

> Clark, et al. v. Poor, et al., Public Utilities Commission of Ohio, 274 U. S., pp. 554, 556, and particularly p. 558.

> "The motor transportation act of Ohio • • • Sections 614-2 to 614-102 both included of the General Code of Ohio, provide that the defendants

* * * as Public Utilities Commission of Ohio have jurisdiction to determine the public convenience and necessity for intrastate operation, but no authority to determine these questions in reference to interstate commerce."

Red Ball Transit Co. v. Marshall, et al., 8 Fed. (2nd), 635-638;

Magnuson v. Kelly, Comr., 35 Fed. (2nd), 867. (Fed. Reporter advance sheets of January 6, 1930.)

"The Ohio motor transportation act does not authorize the Public Utilities Commission to exclude transportation companies operating in interstate traffic from the highways of the state."

Cannon Ball Transportation Co. v. Ohio Public Utilities Commission, 113 O. S., 565 (Syl. 7).

The Ohio motor transportation act went into effect July 28, 1923. Before that time there were no state regulations of intrastate motor common carriers. By said act (Sections 614-2, 614-2a and 614-84 to 614-102 of the Ohio General Code) motor bus and motor truck intrastate common carriers were declared to be public utilities and placed under the regulation of the Ohio Public Utilities Commission. Such intrastate carriers were and are required to secure certificates of public convenience and necessity from the commission before beginning to operate. By the express language of Section 614-101, which is a part of the Ohio motor transportation act, it is provided that the entire act **shall not apply nor be construed to apply to commerce among the states of this Union.**

The procedure for reviewing an order of the commission affecting an intrastate "motor transportation com-

pany," as defined by the act at Section 614-84 (a) (see appendix) it is provided at Section 614-89 (see appendix), which section reads as follows:

> "Sec. 614-89. In all respects in which the Public Utilities Commission has power or authority under this act applications and complaints may be made and filed with such commission, processes issued, hearings held, opinions, orders and decisions made and filed, petitions for rehearings filed and acted upon, and all proceedings before the Supreme Court of this state considered and disposed of by **such court in the manner, under the conditions and subject to the limitations and with the effect specified in the sections of the General Code governing the supervision of other public utilities by the commission.**"

The court's attention is called to the following from said Section 614-89,

> "all proceedings before the Supreme Court of this state shall be considered and disposed of by such court **in the manner, under the conditions and subject to the limitations and with the effect specified in the sections of the General Code governing the supervision of other public utilities by the commission.**"

Such proceedings before the Supreme Court of Ohio shall be considered and disposed of by said court, **but only in the manner, and under the conditions and subject to the limitations and with the effect specified in Sections 614-2 and 614-2a, which sections define public utilities and railroads** (see appendix),—the latter Section 614-2a covers the entire public utility code (Sections 487 to 614-102, both inclusive) known as "Chapter 1, Division 2, Title 3, Part First of the General Code, and the acts amendatory and supplemental thereto or in this act."

This Section 614-2a expressly mentions **Section 502** of the General Code of Ohio (see appendix), **which Section 502** in part follows:

> "This chapter **shall apply to the transportation of passengers and property between points within this state,** * * * in addition thereto the provisions of this act shall apply to the regulation of any and all other duties, services, practices and charges, * * * **which are proper subjects of regulation, excepting only, that they shall not apply to the regulation of commerce with foreign nations, and among the several states, and with the Indian tribes.**"

This Section 502 has been construed when it was a part of what was then known as the railroad commission act, as follows:

> "The legislative intention, which is expressed in this section, underlies the entire act and **limits its scope to intrastate commerce as distinguished from interstate commerce.**"
>
> Railroad Commission v. Railway, 12 O. C. C. (N. S.), 317, 21 O. C. D., 337 (affirmed 83 O. S., 476).

This Section 502, G. C., was known as Section 2 of the original act. **Section 544, G. C.**, which appellees print on page 68 of their printed part of the record, was Section 33 of the original act and was enacted by the Ohio general assembly at the same time as was original Section 2 now known as Section 502, G. C. By the express provision of Section 502, G. C., just quoted, which says the **entire chapter** shall not apply to interstate commerce, and Section 544, G. C., being a part of the same act and the **same chapter**, having in mind said Section 614-89, G. C., which provides that the proceedings before the Supreme

Court shall be "**subject to the conditions and limitations**" specified in the sections of the General Code governing the supervision of other public utilities by the commission, and further having in mind Section 614-101, G. C., which provides that interstate motor transportation common carriers shall not be subject to the provisions of the motor transportation code (Sections 614-84 to 614-102), it must follow, as "the night the day," that Section 544, G. C., has no application, either substantively or procedurally to the interstate commerce of an interstate motor common carrier, whether proposing to operate interstate, or actually operating interstate with motor bus or motor truck.

This being so, as it certainly is, there are absolutely no statutory law provisions that an interstate motor common carrier may or can invoke in order to secure a hearing before the Public Utilities Commission of Ohio or the Supreme Court of Ohio, where the subject-matter of the hearing, either before the commission or the court, is **interstate commerce.** Such subject-matter being **expressly excluded from state scope, jurisdiction and discretion by the express provisions of Ohio statutory law.**

The state court decision in the Grubb case must have been based upon a local state question, for the reason that the interstate commerce question between Ohio and Kentucky at South Portsmouth was entirely outside the scope of state power and discretion. A recent decision of the Ohio Supreme Court shows conclusively that interstate commerce is not within the jurisdiction of the commission or the court, even though the applicant was also engaged in intrastate commerce.

A corporation interstate and intrastate motor bus line applied to the commission for authority to issue stock. The commission dismissed the application in the following words:

> "It is therefore ordered, that, for want of jurisdiction, said application be, and hereby the same is dismissed."

The applicant was an Ohio public utility to the extent of its intrastate certificated operation and thereby was able to get into the Supreme Court.

The court said that the Ohio statutes as to stock issues were not applicable as to the exclusive interstate commerce business and service. That both it and the commission were without jurisdiction of the subject-matter. The court further said (Great Lakes Stages v. Ohio Public Utilities Commission 120 O. S., p. 491) on page 498:

> "**The very gist of jurisdiction** is the power to compel parties to come before the court or body which has the jurisdiction. Control and obligatory authority are the essence of jurisdictional power. This jurisdiction must be conferred by law, **and cannot under any circumstances be conferred by the consent of the parties.**"
>
> 7 Ruling Case Law, Sec. 76, page 1043.

Numerous cases are cited.

On page 499 that court said:

> "Since the Public Utilities Commission can not compel the plaintiff in error to apply to it for authority to issue this stock, it can not be forced by a voluntary application to authorize the same. We agree that the commission has no jurisdiction."

Appellant urges the same doctrine in his assignment of errors and in his "statement of points, Nos. 2, 4, 5, 6, 8, 9, and 11" (see appendix).

By the express provision of the Constitution of the state of Ohio, Section 2, Article IV (see appendix, Plaintiff's Exhibit "A-2"), it is provided that the Supreme Court of Ohio,

> "shall have such **revisory jurisdiction** of the proceedings of administrative officers as may be conferred by law."

"Administrative officers" may be understood to mean "Public Utilities Commission of Ohio."

> Gas Light Company v. Public Utilities Commission, 229 Federal, 670.

> "The powers of the Public Utilities Commission are conferred by statute and it possesses no authority other than that thus vested in it."
>
> Cincinnati v. Public Utilities Commission, 96 O. S., 270;
>
> Sylvania Telephone Co. v. Commission, 97 O. S., 202, 207.

Numerous other Ohio authorities to the same effect may be cited.

We must conclude that both the jurisdiction and power of the Ohio Public Utilities Commission and that of the Ohio Supreme Court as to the orders of the commission is only such as is expressly conferred by law. If the decision and judgment can be interpreted to be a decision and judgment, in the light of the foregoing authorities, then the judgment is absolutely null and void. A void judg-

ment of any court cannot be and never can become res adjudicata in any other court.

"Where a judgment is void for want of jurisdiction of the subject matter or of the person of defendant, it is of no effect whatever as an estoppel, does not merge the cause of action, and constitutes no bar to further litigation upon the same cause of action."

Jasper Bank v. Rome First Nat. Bank, 258 U. S., 112;
34 Corpus Juris, 768.

"No conclusive effect can be given to a judgment which is absolutely void, whether its invalidity results from a want of jurisdiction over the parties, or over the subject matter of the controversy."

Robertson v. Gordon, 226 U. S., 311;
Central Railroad Co. v. Jersey City, 199 Fed., 237;
Parr v. United States, 153 Fed., 462.

An examination of that part of the decision and opinion of the Ohio Supreme Court made in the case in which Grubb, d. b. as The Tri-State Transit Company, and the Public Utilities Commission were the only parties, shows that the only question considered by the court was a question of evidence. The record made March 13, 1928, in the informal, non-statutory and ex-parte hearing before the commission, shows that Grubb, proposing to engage in interstate commerce exclusively, applied to submit himself to the uniform police regulations and laws of Ohio and pay taxes for the use of the highways of Ohio, and the bill of complaint in the District Court so shows, and all this is admitted by the answers to the bill. The bill was filed and federal jurisdiction attached April 20,

1928, and was complete by April 25, 1928, when the commission was served personally by the marshal. Grubb, under trade-name of The Tri-State Transit Company, actually began doing business April 25, 1928, not before this date. On May 31, 1928, Grubb, doing business as The Tri-State Transit Company, filed the petition in error in said Ohio Supreme Court and brought before it the order, "**granted as prayed for,**" made March 13, 1928, and the part of the order that prohibited him from moving his busses to South Portsmouth, Ky. The part of the order of April 2, 1928, so prohibiting, reads:

> "**Ordered**, that said applicant **be, and hereby he is prohibited from incorporating** within the regular route upon which he will herein be granted a certificate to operate within the state of Ohio, **any movement which shall provide for the crossing and recrossing of the Ohio river at Portsmouth, Ohio.**"

Nothing is said about the new interstate toll bridge that had been newly built and for the first time opened for traffic in September, 1927. Nothing said about South Portsmouth, Ohio, **and nothing said about interstate commerce.** It is plain that the commission well knew it was only dealing with uniform police regulations. In other words the **only subject matter** before the commission **was Ohio police regulations and laws and the payment of taxes.** Grubb testified that he would obey the laws and pay taxes. In his application Grubb described his route over U. S. Federal Aid Roads 23 and 52 via South Ports-

mouth, Ky. On March 13, 1928, the day of the hearing, the commission announced:

> "The order is made on the record before us. **We grant him a certificate to engage in interstate service, as prayed for,** effective the first of April."

This certainly meant over the route set forth in the application for the reason that it was this route that was "**prayed for.**" This **was inconsistent** with the order of April 2, 1928, which "**prohibited any movement which shall provide for the crossing and recrossing the Ohio river at Portsmouth, Ohio.**" The Ohio Constitution providing that the Supreme Court shall have "**such revisory jurisdiction**" as may be **conferred by law** of the "**proceedings**" of administrative officers, and Section 544, G. C., providing that **revisory jurisdiction shall mean**, to wit: **reverse, vacate** or **modify** (not "**affirm,**" the word "**affirm**" not being in the Section No. 544 at all), Grubb, d. b. a., etc., applied to the court to have it "**revise**" the "**prohibition**" and **modify** it, so that it would be consistent with the "granted as prayed for" order of March 13, 1928. The jurisdiction of the Ohio Supreme Court **is not appellate** in these kinds of cases, it is "**such revisory jurisdiction as may be conferred by law,**" as the Ohio Constitution reads. The proceeding before the commission **was not adversary.** The protestants tried to make it such, but the **commission stopped them.** They outlined the evidence they expected to introduce, but the commission would not let them, saying the questions were federal in character and would have to be passed on by the federal authorities. (See opinion, Oh. Sup. Ct., ap-

pellee's printed record, page 79.) There were no pleadings and it is admitted on all sides that Grubb agreed to obey and comply with Ohio laws and pay taxes. The District Court, as appears from its opinion (page 86, appellee's printed part of the record), could not definitely tell what the prohibition meant. There was no evidence before the commission that The Interstate Motor Transit Company, the corporation, was operating busses across the Ohio river, either by bridge or ferry. There was nothing said about Grubb proposing to cross the river by ferry or new bridge. Grubb said he intended to go to South Portsmouth, but would carry no passengers whose complete ride would be between Portsmouth, O., and South Portsmouth, Ky., because there were other local bus and taxi lines that took care of that. From the record the Ohio Supreme Court could not tell whether The Interstate Motor Transit Company and The Cannon Ball Transportation Company, were corporations or not. The court evidently assumed that they were either partnerships or just trade names, for the court said that the commission had the right to examine its records and find from them what Grubb had done under certificates previously issued to him and after such examination and investigation, and finding bad conduct in operation, make such order as would prevent such bad conduct again. The record in the District Court shows and it is admitted that Grubb never had a certificate or permit issued to him of any kind, and that The Interstate Motor Transit Company and The Cannon Ball Transportation Company were corporations, that on May 10, 1927 (see order of April 2,

1928, appellee's printed part of record, page 71), the corporation, The Interstate Motor Transit Company, was the only defendant that had a certificate, and that it was it that had been guilty of subterfuge, while Grubb was president and general manager. **But Grubb continued in both positions with said corporation, and after the bridge was opened for traffic to South Portsmouth, Ky., it applied to the same Ohio commission to go to South Portsmouth, Ky., over the new bridge and turn right around at the Kentucky end of it and return at once to Ohio, and was actually granted the right and certificate so to do by amendment to its original certificate by the Ohio Public Utilities Commission on September 21, 1927.** (See appendix, appellant's brief, Plaintiff's Exhibit "O.") None of this was in the record made before the commission at the hearing on March 13, 1928.

An intrastate certificate of public convenience and necessity is a mere personal license.

Westhoven v. The Comm., 112 O. S., 411.
Estabrook v. The Comm., 112 O. S., 417.

There is no such thing as an interstate certificate of public convenience and necessity.

Clark v. Poor, et al., 274 U. S., p. 554.
Interstate Busses Corp. v. Holyoke St. Ry., 273 U. S., p. 45.

By turning to the part of the opinion and syllabus of the decision and opinion of the Ohio Supreme Court, in so far as the same applies to Grubb, it will appear that there were two proceedings in error, and that the deci-

sion is based as to Grubb, solely, in so far as it refused to revise the order, on the assumption that Grubb had operated under certificates previously granted to him personally, and that he had proposed to the Ohio commission to operate in intrastate commerce.

The following summary as to Grubb's Ohio court case shows that the question was purely a state question as distinguished from a federal question, and that the decision was based on state law and not federal law:

(1) The Supreme Court did not have power to "affirm."

(2) The proceedings before the commission were not adversary.

(3) The court assumed that Grubb had previously operated under certificates issued to him, which was not the fact, but the court arrived at this conclusion because there was no evidence to show that The Interstate Motor Transit Company and The Cannon Ball Transportation Company were and had been from the first corporations. Protestants before commission introduced no evidence.

(4) The court did not know, because not in the record, being not material where applicant proposes to **engage in interstate commerce exclusively**, that the commission on September 21, 1927, after new bridge opened, had, while Grubb was president and general manager of The Interstate Motor Transit Company, granted said corporation the right to engage in interstate commerce to and from South Portsmouth, Ky., over said new bridge, and had thereby forgiven said corporation and Grubb too for that matter, for what it had been found guilty of in May, 1927. (See Plaintiff's Exhibit "O," appendix.)

(5) If the Ohio court did not ground its judgment on questions of state law, but did ground it on the question of interstate commerce, then it attempted to **exercise jurisdiction entirely outside the scope of state power,** and the judgment in such case, is **absolutely void.** The federal jurisdiction to regulate **exclusively interstate commerce motor common carriers, since congress has not legislated as to such carriers, is exclusive of all state power of the kind, such power being reserved by the commerce clause for federal regulation.**

Buck v. Kuykendall, etc., 267 U. S., 307.
Bush & Sons v. Maloy, et al., 267 U. S., 317, and 325.
Interstate Busses Corp. v. Holyoke St. Ry., 273 U. S., 45.
Sprout v. City of South Bend, 277 U. S., 163.
Magnuson v. Kelly, Commr., 35 Fed. (2nd), 867. (Fed. Reporter of Jan. 6, 1930.)
Atlantic & Pacific Stages, Inc. v. Stahl, et al., U. S. Dist. Ct., Western District of Mo., decided Nov. 20, 1929, reported in United States Daily of Dec. 7, 1929, page 6; Yearly Index, page 2646.
Clark v. Poor, et al., 274 U. S., 554.
Red Ball v. Marshall, et al., 8 Fed. (2nd), 635.
Hi-Ball Transit Co. v. Rd. Comm., 27 Fed. (2nd), 425.
New Orleans v. New Orl. Water Works Co., 142 U. S., 79.
Harrison v. Morton, 171 U. S., 38 and 39.

THE REASON FOR PROHIBITING GRUBB AS SET FORTH IN THE ORDER OF APRIL 2, 1928.

The court's attention is called to pages 71, 72 and 73 of appellee's printed part of the record. This order of April 2, 1928, cites a case against The Interstate Motor Transit Company, a corporation, **an exclusive interstate motor bus common carrier.** That case was decided May 10, 1927. Grubb was not a party in that case. **This was before the new interstate toll bridge was built connecting Portsmouth, Ohio, with South Portsmouth, Ky.** Ferries were the only means of crossing the Ohio river generally used by the public at that time. The corporation, The Interstate Motor Transit, is now and has all along been operating to Kentucky end of bridge.

The record made before the commission on March 13, 1928, did not show that the commission had granted The Interstate Motor Transit Company the right to go across this new bridge on September 21, 1927, for the reason that Grubb's proceeding was non-statutory, there were no defensive pleadings, was not, in law, adversary and the protestants introduced no evidence. (Appellee's printed part of record, top page 80.) Grubb was willing to obey all applicable Ohio laws and pay taxes. There was no issue. The subject-matter of police regulations were to be obeyed and Grubb told where he lived and said he proposed to engage in **interstate commerce exclusively.** The matter of interstate commerce was excluded by the express words of Ohio statutes, Sections Nos. 502 and

614-101, and the numerous decisions of the United States Supreme Court. So the state court said to the corporation-protestant-plaintiffs in error in their case (119 O. S., 264) (appellee's printed part of the record, page 79) that the commission was right in holding that the questions were federal in character and must be passed on by the federal authorities. So it is plain that the commission kept from the Supreme Court of Ohio the order of September 21, 1927, where it granted The Interstate Motor Transit Company, even while Grubb was president and general manager, the right to cross to South Portsmouth and come right back. (See appellee's printed part of record, bill of complaint, para. 15; Comm. Ans., para. 15.) In the light of the foregoing, and in the light of the events that occurred after April 2, 1928, such as the Kentucky and West Virginia permits, all of which and many other facts are in the record in the District Court, but were not in the record in the state court, the part of the Ohio decision refusing to revise and clarify the prohibitory part of the order of April 2, 1928, so as to conform with the order, "granted as prayed for," of March 13, 1928, can only be understood as being based on purely state law.

> "To make a case reviewable by the Supreme Court from the highest court of a state, it must affirmatively appear on the face of the record that a federal question within the scope of state power was presented, and expressly or necessarily decided by such state court."
>
> Whitney v. The People, 274 U. S., 360.
> Herkness v. Irion, 278 U. S., top page 94.

WHAT DO THE WORDS, "WE GRANT HIM A CERTIFICATE TO ENGAGE IN INTERSTATE SERVICE, AS PRAYED FOR" MEAN?

On March 13, 1928, the commission announced and wrote on the file, and the stenographer took it down, "We grant him a certificate to engage in **interstate service, as prayed for.**" On April 2, 1928, the commission made a written order prohibiting movement across and reacross the new interstate bridge at Portsmouth, Ohio, but did not mention or use the words "interstate service" at all in the prohibition of April 2, 1928. The state court relied on the written order of April 2, 1928, which did not say anything about "**interstate service**" in the prohibitory part. So again it is plain, in view of the assertion of Section 614-101 in Grubb's petition in error, that the state court paid no attention to interstate commerce at all, or "**interstate service**" at all. It was only thinking about intrastate service. But Grubb had never had a certificate issued to him, and he had not yet begun to operate in interstate commerce exclusively—he informed the commission that he proposed to do so, but while doing so he would obey Ohio laws and pay taxes. The interstate commerce question was therefore not in any sense the subject-matter either before the commission or the state court. Therefore there could be no judgment as to such federal question. The state court disclaimed deciding the federal question, and the District Court so

found, for it said (appellee's printed part of the record, pages 88-89):

> "The state court in its opinion (119 O. S., 264) failed to deal with the illegality of the commission's action and findings in relation to the constitutional guarantees and limitations."

The District Court misapplied Section 544, G. C., for the reason that this section is applicable only when the motor carrier is engaged in intrastate service, unless congress has by statute made the jurisdiction concurrent. But congress has not done this as to exclusively interstate motor carriers. (See Buck and Bush cases, supra.) The District Court cited Hocking Valley Ry. Co. v. The Commission, 100 O. S., 321. An examination of this case shows that it concerned a purely intrastate service all within the state of Ohio. Again the District Court cited Chicago, Rock Island & Pac. Ry. Co. v. Schendel, Admr., 270 U. S., 611. This case is not in point at all, for congress by the Federal Liability Act has made state and federal jurisdiction in cases under it concurrent. The question in this case invoked the "full faith and credit clause" and its application, and was concerned with two state judgments of Iowa and Minnesota.

The foregoing analysis of the decision and opinion of the Ohio Supreme Court shows conclusively that it did not deal with or decide any federal question whatsoever, and neither it nor the commission had the jurisdiction or power so to do.

NEW FACTS OCCURRING AFTER THE RECORD WAS MADE BEFORE THE COMMISSION, MARCH 13, 1928.

Kentucky permit extended to April 25, 1928.

Grubb and the Ohio commission sued by corporation-competitor-protestants.

West Virginia grants Grubb interstate certificate April 13, 1928.

Grubb pays Ohio taxes April 23, 1928, and Ohio accepts the same. (See appendix.)

Grubb becomes an actual interstate operator April 25, 1928.

April 20, 1928, Grubb sues in United States District Court, gives bond, subpoenas and restraining order granted and allowed to issue.

April 23, 1928, all defendants, including corporation-competitor-appellees, are served personally, excepting the commission and its members.

April 25, 1928, the Public Utilities Commission of Ohio and each of its members are personally served with notice, subpoenas and restraining order.

In his bill of complaint at paragraph 15, Grubb charges discrimination against his interstate commerce across the new interstate toll bridge, in that the commission denied and prohibited him April 2, 1928, while it granted The Interstate Motor Transit Company, a corporation, a competitor, September 21, 1927, the right to engage in interstate commerce across and reacross this same inter-

state toll bridge, and that said corporation is still so operating. Over a year later the commission files its answer and at paragraph 15 thereof, it avers, in substance, that even though it had so granted The Interstate Motor Transit Company, that by so doing it did not violate the Fourteenth Amendment, Section 1.

DISCRIMINATION AGAINST INTERSTATE COMMERCE.

Early in September, 1927, the new interstate bridge between South Portsmouth, Ky., and Portsmouth, Ohio, was completed. On July 29, 1927, and August 1, 1927, The Interstate Motor Transit Company and the Ohio commission exchange letters relative to the former applying to get certificate or amendment thereto to cross and recross the new interstate bridge aforesaid. On September 21, 1927, the commission makes the order and grant whereby the corporation-competitor, The Interstate Motor Transit Company (Grubb then president and general manager) is certificated to go across said new interstate bridge to the Kentucky end of said bridge to a bus terminal, called all along there South Portsmouth, and turn around and come back and connect with its route at intersection of U. S. Federal Aid Roads 23 and 52 in Portsmouth, Ohio, which intersection is also known as Second street at the north end of said bridge. (See appendix to this brief, Plaintiff's Exhibits 12 and 13, and Plaintiff's Exhibit "O.")

The answer of The Interstate Motor Transit Company at its para. 15 (appellee's printed part of record, page

38), admits that it is still so operating, but denies that the commission's order of September 21, 1927, is in conflict with the Fourteenth Amendment.

(In the appendix of this brief and record, are two photographs of the bridge and the Kentucky shore; one, Defendant's Exhibit "B," shows the shore up-river towards Fullerton, Ky.; the other, Defendant's Exhibit "C," shows the Kentucky shore down-river towards the C. & O. Rd. depot at South Portsmouth. These photos do not show Fullerton and South Portsmouth proper. The building just west of the Kentucky end of the bridge, just above the two freight cars on Defendant's Exhibit "C," is the Union bus terminal. It is to this terminal that The Interstate Motor Transit, The Cannon Ball Transportation, and Grubb's busses, run. These photographs, taken in connection with the blue print herein, will show the highway, the location of Fullerton and South Portsmouth, and U. S. Federal Aid Road No. 23 on the Kentucky side. Between Fullerton and Greenup it is under construction and impassable, so it is plain that Grubb could not have applied to go to Huntington on the Kentucky side from South Portsmouth.)

Grubb's route was over this bridge to said bus terminal, operating as The Tri-State Transit Company, and return, is exactly the same as that of The Interstate Motor Transit Company.

Grubb contends in said para. 15 of his bill that such discrimination violates his rights to the equal protection of the laws and is contrary to the Fourteenth Amendment, Federal Constitution.

Counsel for appellant know that appellees have tried to confine their motion to dismiss or affirm to paragraphs 1, 2, 3, 4, 5, 7, 8, 9 and 10 of the bill. They do this because they do not desire the court to learn that in this case there is a very vital question of interstate commerce concerning an interstate commerce motor carrier in such commerce exclusively, and they desire to evade the effect of the decisions of court in the Buck, Bush, Intercity Busses Corp., Sprout and Clark-Poor cases. We insist on the consideration of this exclusive interstate commerce question and the discrimination question. These questions are made in paragraphs 11, 12, 13, 14, 15, 16, 17 and 18 of the bill, pages of appellee's printed part of the record, 14, 15, 16, 17, 18, 19, 20, 21 and 22. We also insist on our amendment to the bill, para. 6, on pages 24 and 25 of the same record. We further insist that the decision of the motion to dismiss or affirm does not at all depend on the few paragraphs appellees cite. It would be unjust and unfair to consider a part only of the bill in any case, and we feel that this court will consider the entire bill amendment thereto and the other exhibits.

This question of discrimination against interstate commerce is unlawful, regardless what boundary line of Ohio may be crossed in the operation of an interstate bus line, whether east, west, north or south. In this case, however, it is especially glaring. The Interstate Motor Transit Company, a corporation, is a direct competitor, and has been from the first, and has insisted that because it is such a competitor in the interstate carriage of passengers, that if Grubb is permitted to operate over the

bridge, he will take some of its passengers. If this is not so, then why is it in the case at all? What other interest could it have? If there are no passengers to be carried in interstate commerce back and forth over this bridge to points in Ohio and West Virginia and back, then it can suffer no injury, and it is out of the case as a non-interested party. No damage can be done it unless there is interstate commerce passengers to be carried, and if there are none, then it should stop using the bridge and should have stopped long ago. The fact of its very presence in this case, and also the fact of the presence in this case of The Cannon Ball Transportation Company, as interested parties, is proof positive that there exists and has existed interstate commerce passengers over this new bridge. Why did the Interstate Motor Transit apply to amend its certificate and get it September 21, 1927, if it were not for the passengers traveling interstate? The fact of this grant proves that it did so to carry the interstate passengers that it knew were there. Why build this beautiful bridge unless there was a demand for it? Why a toll bridge unless there were people to pay the toll? The picture of the bridge given facing page 67 of appellees' printed part of the record, proves that there exists people on the Ohio as well as the Kentucky side to use it, otherwise it would not have been built. The photographs in the appendix hereto show autos and people on the bridge.

INTERSTATE COMMERCE DISCRIMINATION CONTINUED.

Appellees in their brief on page 15 try to make it appear that there is no interstate commerce by motor bus across the new interstate toll bridge between Ohio and Kentucky at Portsmouth, Ohio. They cite to support their theory Inter-City Coach Co. v. Atwood, et al., 21 Fed. Rep. (2nd), 83. They have not examined this case. There was no great new $1,000,000 interstate toll bridge between Rhode Island and Massachusetts where the coach company crossed. The coach company had been and was operating intrastate and sought to extend its intrastate line and was denied; then, to avoid the effect of the Rhode Island officials, the coach company, without applying at all and agreeing to submit itself to Rhode Island laws and pay taxes, and without going to Massachusetts at all, deliberately began to operate in competition with a carrier along which it had previously sought to extend and was denied. In pursuance of its plan and ignoring the authority of both states in the matter of police regulations and payment of taxes, it ran its busses just over the line into Massachusetts and did not even have a stopping place or terminal. In view of such a set of facts there was no other decision for the District Court than the one it did make. There was no other competitor of the coach line in interstate operation that was doing what the coach line was doing. So the case is not at all in point. How different is Grubb's case. His case was like Buck's case, 267 U. S., 307.

Like Buck, Grubb had obtained from Kentucky the permit prescribed by its laws. This permit allowed Grubb as The Tri-State Transit Company to use this very bridge from South Portsmouth to Portsmouth and other points on his interstate route. (See appendix.)

This court said on page 316 of the Buck case:

> **"The vice of the legislation is dramatically exposed by the fact that the state of Oregon had issued its certificate which may be deemed equivalent to a legislative declaration that, despite existing facilities, the public convenience and necessity required the establishment by Buck of the auto stage line."**

By substituting "Grubb" for "Buck" and "Kentucky" for "Oregon", the vice of the order of the Ohio commission prohibiting him, **"is dramatically exposed."** It would then read:

> "The vice of the legislation is dramatically exposed by the fact that the state of Kentucky had issued its **permit which may be deemed equivalent to a legislative declaration that, despite existing facilities (The Interstate Motor Transit Company and The Cannon Ball Transportation Company, appellees herein), the public convenience and necessity required the establishment by Grubb of his exclusively interstate motor bus line."**

The Ohio commission on September 21, 1927, when Grubb was president and general manager, granted and issued a certificate to the corporation, The Interstate Motor Transit Company, the right to cross said new interstate toll bridge from the intersection of Second street and the north end of the bridge (same being intersection of U. S. Federal Aid Roads 23 and 52) to bus

terminal at Kentucky end of said bridge, called South Portsmouth, and turn and come right back across to said intersection and from thence to other points on said corporation's route. (Appendix, original certificate of said corporation, Plaintiff's Exhibit "V.") Such grant of the Ohio commission (Plaintiff's Exhibit "O," appendix) "may be deemed equivalent to a legislative declaration that, despite existing facilities, public convenience and necessity required the establishment by" The Interstate Motor Transit Company, the corporation, of its motor bus line between Portsmouth, Ohio, and South Portsmouth, Kentucky, over said bridge.

Buck v. Kuykendall, etc., 267 U. S., 307.

Kentucky having granted its permit to Grubb over the bridge and Ohio having granted its certificate to The Interstate Motor Transit Company over the very same bridge, the two grants, one by the Kentucky highway commissioner and the other by the Ohio commission, makes it unanimous, and that therefore that the issuance of the certificate by Ohio to The Interstate Motor Transit Company and the issuance of the permit to Grubb by Kentucky, "may both be deemed equivalent to a legislative declaration that, despite existing facilities, public convenience and necessity required the establishment" by Grubb of his interstate bus line.

Calling the court's attention to the bill of complaint, para. 15, we charge discrimination against interstate commerce.

> "Of course the state may not discriminate against interstate commerce."
>
> Morris, et al. v. Duby, et al., 274 U. S., 135.
> Buck v. Kuykendall, etc., 267 U. S., 307.

"A state cannot discriminate in favor of intrastate commerce against interstate commerce. No more can a state discriminate between interstate common carriers for hire by motor vehicles."

Magnuson v. Kelly, Commr., 35 Fed. (2nd), 867. Federal Reporter advance sheets of Jan. 6, 1930.

The charge of "subterfuge" comes with very poor grace from The Interstate Motor Transit Company, when the commission grants it the right to go to South Portsmouth and return, and prohibits Grubb from doing exactly the same thing. It is not a subterfuge. Kentucky says it is not as to Grubb. Ohio says it is not as to The Interstate Motor Transit. The Interstate Motor Transit Company is a direct competitor of Grubb. It admits this, for otherwise it is not in this case. The fact of its actual operation, the great new interstate bridge and the busy Ohio river valley in the region proves this. The Ohio river has just been improved for navigation and the president but recently dedicated the great project. "Competition is the bone of contention," and this necessarily proves the existence of interstate commerce in the region. (Grubb describes the region in his testimony and the business over this bridge in the appendix to this brief. The county surveyor Noel does the same thing and tells of the need of the bridge. See appendix.)

"If a state law relative to operation of motor vehicles for hire, directly interferes with or burdens interstate commerce, it cannot be sustained, regardless of the purpose for which it was passed."

Interstate Busses Corp. v. Holyoke St. Ry. Co., 273 U. S., 45. See also bottom of page 50 of the report.

So the reason of the commission, that if it granted Grubb, it would make it possible for Grubb to engage in intrastate commerce, and therefore to prevent this possibility after he began operation, it prohibited him from going across said interstate bridge by the order of April 2, 1928. But it being proved that there is commerce over this bridge, and it being admitted that said bridge connects the two states of Ohio and Kentucky, the commerce becomes commerce among the two states and the busses moving across and reacross are in interstate commerce and consequently the Ohio commission is without power and jurisdiction and discretion to prohibit said commerce by prohibiting bus movement over the Ohio river at Portsmouth, Ohio, "regardless of the purpose for which said order of prohibition was made."

Interstate Busses Corp. v. Holyoke St. Ry. Co., 273 U. S., 45.

Commerce Clause, Constitution of the United States, Art. 1, Sec. VIII.

Fourteenth Amendment to U. S. Const., Sec. 1.

The Ohio commission finding as to The Interstate Motor Transit Company that there was interstate commerce and the Kentucky department of motor transportation finding as to Grubb, under trade-name of The Tri-State Transit Company interstate commerce over the new interstate bridge between Portsmouth, Ohio, and South Portsmouth, Kentucky, and "the bone of contention" being competition between motor bus common carriers over said bridge, as to which congress has not legislated, it must follow that the order of the Ohio Public Utilities Commission in so far as the same prohibited Grubb,

d. b. a. The Tri-State Transit Company, as a motor bus common carrier in exclusively interstate commerce, "invaded a field reserved by the commerce clause for federal regulation," and that therefore neither the Ohio commission, nor the Ohio Supreme Court, had jurisdiction or power as to such interstate commerce, such jurisdiction or power being completely outside the scope of state power, such power being federal power exclusive of all state power. The lower District Court therefore erred in construing and applying the judgment of the Ohio Supreme Court as a judgment that decided the interstate commerce question, and then, after so construing and applying said judgment, holding the same res adjudicata and dismissing the bill and amendment thereto.

The Buck Case, 267 U. S., 307 to 316.
Bush & Sons v. Maloy, et al., 267 U. S., 317 to 325.
Clark v. Poor, et al., 274 U. S., 554.
Atlantic & Pacific Stages, Inc. v. Stahl, et al., The United States Daily of Dec. 7, 1929, page 6; Yearly Index, page 2646, columns 6 and 7. The West Publishing Co. advises that this decision is in process of publication in the Federal Reporter advance sheets.
Ohio Const., Sec. 2, Art. 4; Appendix, Plaintiff's Ex. "A-2."
Sections 614-101, 614-89, 614-2a and 502 (appendix hereto).

THE OHIO SUPREME COURT WAS TOTALLY WITHOUT JURISDICTION, SUCH JURISDICTION BEING WITHIN THE EXCLUSIVE JURISDICTION OF THE FEDERAL COURTS.

It has been shown:

(1) That the Ohio Supreme Court shall have such jurisdiction of administrative officers and their proceedings as may be conferred by law.

(2) That the Public Utilities Commission of Ohio is an administrative board, and has only such jurisdiction as is expressly conferred upon it by statute.

(3) That no jurisdiction or power has been conferred upon it as to questions of interstate commerce, but on the contrary Sections 502, 614-101 and 614-89 of the Ohio General Code (see appendix hereto) expressly declare that the entire public utility code of Ohio shall not apply nor be construed to apply to interstate commerce.

(4) That as to G. C. Section 544, which provides that the Supreme Court may revise an order of the commission, Section 614-89, G. C., provides that said Section 544 shall be subject to the limitations provided by Sections 502 and 614-101, which provide that Section No. 544 shall not apply to interstate commerce.

There is therefore no jurisdiction conferred on the Ohio Supreme Court to revise an order of the commission in so far as said order deals with the question of exclusive interstate commerce. And the Ohio Supreme Court so said in its opinion, saying "that the questions were fed-

eral in character and must be passed on by the federal authorities." The Supreme Court were advised in Grubb's brief that the federal questions were pending in the United States District Court. So the lower District Court said in its opinion, as heretofore quoted, to wit:

> "The state court failed to deal with the illegality of the commission's action and findings in relation to the constitutional guarantees and limitations."

The case of Magnuson v. Kelly, 35 Fed. (2nd), 867, supra, presents this exact situation. Kentucky has a provision like Ohio General Code Section 544, same being Sections 2739j-1 to 2739j-41, which provide for an appeal to the Circuit Court. Its motor transportation act, at Section 2739j-19, quoted on page 869 of the report, "provides that it shall not apply nor be construed to apply to interstate commerce, except in so far as permitted by the Constitution of the United States and the acts of congress." It was insisted in the United States court in that district that Magnuson should have gone to the Circuit Court and that he had an adequate remedy there at law. But the District Court overruled this contention and said:

> Syl. 3. "Provision of acts of Kentucky, 1926, c. 112, for appeal to Circuit Court from refusal of application for certificate of public convenience and necessity by commissioner of motor transportation, held inapplicable to applicant suing for injunction restraining commissioner and others from interfering with operation of interstate bus line, in view of Const. of United States, Art. 1, Sec. 8, and Const. Amendment 14."

We even have Ohio authority along this line cited earlier in this brief. Reference is made to Great Lakes Stages v. The Commission, 120 O. S., 491, 498 and 499.

These authorities and statutes can lead to but one conclusion, and that conclusion is that the Ohio Supreme Court was wholly without jurisdiction, and that there was no provision provided by Ohio law to take the interstate commerce question to the court,—and in view of the decision in The Great Lakes Stages case, Grubb could not confer jurisdiction on the court as to such question by filing a petition in error asserting the question.

We have shown earlier in this brief that he quoted Section 614-101, G. C., in his petition in error, which provides that the public utility statutes as to public utilities shall not apply nor be construed to apply to interstate commerce. Both the state and the lower District Court said in their opinions that the state court failed to deal with the constitutional guarantees and limitations. It is plain they applied the Section 614-101, G. C.

THE JURISDICTION OF THE FEDERAL COURTS IS EXCLUSIVE.

In Atlantic and Pacific Stages v. Stahl, et al. (U. S. District Court, Western District of Missouri), decided November 20, 1929, cited supra, after discussing and analyzing the cases of Clark v. Poor, 274 U. S., 554; Interstate Busses Corp. v. Holyoke St. Ry., 273 U. S., 45; Sprout v. South Bend, 277 U. S., 163 and 177, says:

> "The exclusive control of interstate commerce is given by the Constitution to congress. No state may

pass any law which prohibits or unduly burdens interstate commerce. For certain limited purposes a state may pass a law which incidently affects interstate commerce, provided it does not prohibit or unduly burden such commerce. Thus a state may pass a law imposing a tax upon a company operating motor vehicles exclusively in interstate commerce, over the highways of the state, if it is imposed for the upkeep and maintenance of those highways, provided it does not discriminate against interstate commerce." * * *

"If as applied it directly interferes with or burdens appellant's interstate commerce, it cannot be sustained regardless of the purpose for which it was passed. * * * No license from local authorities or a certificate of public convenience and necessity is required in respect of transportation that is exclusively interstate.

"The law then is that a state may not require a carrier doing both intrastate and interstate business to obtain a certificate or a license as to its intrastate business if that will burden its interstate business. Certainly if it cannot even burden a carrier's interstate business by requiring it to obtain a certificate of convenience and necessity, or a license as to its intrastate business, it cannot absolutely prevent its doing an interstate business, because it has not obtained as to its intrastate business such a certificate or license." * * *

"Suppose a law enacted by the legislature prohibited all persons from using the highways for the interstate transportation of passengers if they also carry passengers intrastate without a certificate of convenience and necessity, such a law could be defended only on the doctrine that a state may invade the exclusive field of legislation given by the Constitution to congress if it is done for the purpose of more effectively enforcing the state's laws. No such doctrine is tenable. Yet the law we have supposed is really what we have here as it has been construed

by the commission." (So the order in Grubb's case is supposedly promulgated by such a law of Ohio, when in truth and in fact there is no such law, unless it is one wrongly construed and applied.)

"The commission's order was not one which merely incidently affected interstate commerce. It was not made in the exercise of the police power for protection of public safety. It was as to this plaintiff an absolute and conditional prohibition of interstate commerce imposed not because of any failure by the plaintiff to comply with some conditions prescribed in the statutes as to such commerce, but as a punishment for past and possible future transgressions entirely unrelated to interstate commerce.

"If the plaintiff carries on an intrastate business on the highways of the state in defiance of the authority of the state, it may be punished for it. It may be punished by a fine or other pecuniary penalty or by imprisonment of its officers or agents. **But it may not be punished by the deprivation of its constitutional right to engage in interstate commerce."**

This case is exactly like Grubb's case. The commission sought to punish him for what The Interstate Motor Transit Company did in May, 1927, by prohibiting him from moving his busses over the interstate bridge at Portsmouth, Ohio, thereby preventing him from using them in interstate commerce. **Such commerce being exclusively within the federal scope and not within state scope, it must follow that the state judgment as construed is absolutely void.**

Section 614-100, quoted on page 17 (Appellee's printed part of the *Record*), paragraph 14, fixes the penalty that Grubb would suffer should he engage in intrastate commerce without a certificate. This will protect the rights

of the state and the public. But as stated by the court in The Atlantic and Pacific Stages case just quoted, a state cannot prohibit interstate commerce and thereby by such prohibition make the same a penalty for possible past or future violations.

THE PLEA OF RES ADJUDICATA.

The judgment of the Ohio Supreme Court, as construed by the District Court and applied by it as a bar, and thereby allowing itself to be ousted of its exclusive federal jurisdiction, is certainly reversible error, for the reason that the judgment as applied and construed, is absolutely void. **A void judgment is a nullity and can never become res adjudicata.**

THE DISTRICT COURT ERRED IN FAILING TO DECIDE THE FEDERAL QUESTIONS BEFORE IT ON THE MERITS.

The case in the District Court was fully and finally submitted November 10, 1928. It held it over 6 months and then dismissed the bill and amendment thereto, after construing and applying the state court's judgment and sustaining a plea of res adjudicata. The judgment being void, as construed, such plea can not be sustained. It was the duty of the court to decide the federal questions and exercise its exclusive jurisdiction. It failed to do this. We thus contend at Points Nos. 2, 10 and 11 of appellant's statement of points printed in the appendix hereto. Beginning with the Buck case, 267

U. S., 307, numerous decisions of this court and many of the decisions of the District Courts, hold that the jurisdiction over exclusive interstate commerce by motor common carrier for hire is exclusive. It was therefore the duty of the lower District Court to decide the federal questions and thereby exercise its exclusive federal jurisdiction.

Risty, et al. v. Chicago, R. I. & P. Ry. Co., 270 U. S., 378, and top of page 387:

> "It is the duty of the federal courts, in suits brought in or removed to them, to decide for themselves all relevant questions of state law, and while they will follow the decisions of state courts as to the interpretation of a state statute, we do not think that the case of Gilseth v. Risty, 46 S. D., 374, so clearly or decisively passed upon the question here involved as to control our decision." From page 387 of Risty case, supra.

Kuhn v. Fairmont Coal Co., 215 U. S., 349.

CONCLUSION.

Summing up, appellant believes that if the following two questions are properly answered, the decision and finding of the lower District Court must be reversed.

These questions are as follows:

First. Did Grubb propose to become an "Ohio motor transportation company public utility?"

Second. Is the jurisdiction of the federal government and its courts exclusive in the regulation of a motor bus common carrier of passengers for hire that carries such passengers in interstate commerce exclusively?

We contend that the first question should be answered

"**No.**" The Ohio Constitution and statutes reviewed in this brief and set forth in the appendix of it plainly show that Grubb's proposed operation was interstate commerce **only.** Even as against intrastate commerce an order of the Ohio commission is not an injunction. No stay or injunction was granted by the Ohio Supreme Court in either of the two cases before it. Section 614-93, G. C., "Motor Transportation Act," allows intrastate motor carriers to immediately re-apply after a certificate has been refused, and this is true even though the Supreme Court has exercised "revisory jurisdiction" as to the order refusing such intrastate carrier. Section 614-67, G. C., appearing in the appendix to this brief as Plaintiff's Exhibit "A-1", provides that before an order of the commission can become a judgment or decree by way of injunction or mandamus, the attorney general must bring an action in a court of competent jurisdiction after being advised by the commission.

> Sylvania Telephone Co. v. Commission, 97 O. S., 202, 208 (See "Statement of Points," Appendix, Point 9 (f)).

As to question No. 2 above, we contend that it should be answered "**Yes.**"

> "That the motor age has dawned does not change the law, and, beginning with Buck v. Kuykendall, 267 U. S., 307, wherein Mr. Justice Brandeis, for the court said: 'Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the commerce clause. It also defeats the purpose of

congress expressed in the legislation giving federal aid for the construction of interstate highways' * * * down through Bush v. Maloy, 267 U. S., 317; Interstate Busses Corporation v. Holyoke Street Railway Co., et al., 273 U. S., 45; Interstate Busses Corporation v. Blodgett, Tax Commissioner of Conn., et al. (February 20, 1928), 48 S. Ct., 230; Clark v. Poor, 274 U. S., 554, and Sprout v. City of South Bend, Indiana, May 14, 1928, 48 S. Ct., 504, which treat of similar cases from the states of Washington, Ohio, Connecticut, Maryland, Massachusetts, and Indiana, there has been a consistent maintenance of the supremacy of the nation over such interstate traffic."

Hi-Ball Transit v. Railroad Commission of Texas, 27 Fed. (2nd), 425.

To the list of states mentioned by Judge Atwell in the last quoted case, may be added Kentucky and Missouri, the Federal District Court sitting in said two states also holding that the federal government's supremacy over interstate traffic solely is supreme.

Magnuson v. Kelly, Commissioner, 35 Fed. (2nd), 867;

Atlantic & Pacific Stages v. Stahl, et al., cited supra.

In the Hi-Ball case from Texas just referred to, the three-judge court said:

"This court would have no more jurisdiction to order the commission in the intrastate field than does the commission have in the interstate field."

Sanger v. Lukens (D. C.), 24 Fed. (2nd), 226;

Hi-Ball Transit v. Railroad Commission of Texas, 27 Fed. (2nd), 425.

We therefore conclude that the decree of the District Court should be reversed, that it be required to exercise its exclusive federal jurisdiction on the record made and submitted to it November 10, 1928, or in the alternative that this court make such order in the premises that will grant appellant the relief prayed for in his bill of complaint and amendment thereto.

Respectfully submitted,

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APPENDIX.

Statement of Points.

Comes now the appellant in this cause and states the points upon which he intends to rely in this court in this case, as follows:

Point 1.

The District Court of the United States for the Southern District of Ohio, Eastern Division, erred in dismissing the complaint, amendment to complaint and this case, and dissolving the temporary restraining order.

Point 2.

Said District Court erred in failing to exercise its federal jurisdiction and power, for the reason stated in its opinion, that the question of res judicata or estoppel "is entirely independent of the question of the jurisdiction of this court."

Point 3.

The District Court erred in granting leave to file and the filing of the answer of the Public Utilities Commission of Ohio and the supplemental and amended and amendment to answers of the corporation defendants, out of rule, and in admitting in evidence Exhibit "X-I."

Point 4.

Said District Court erred in interpreting and applying the judgment of the state court, and in holding that said judgment so interpreted and so applied was res judicata

or an estoppel and by so holding ousted itself of full prior acquired federal jurisdiction and power.

Point 5.

Said District Court erred in failing to exercise its exclusive jurisdiction of the interstate commerce question, and in failing to find and hold that the judgment of the state court, as interpreted by said District Court, was totally outside the scope of state power.

Point 6.

Said District Court having in its opinion found that the "state court in its opinion (119 O. S., 264) failed to deal with the illegality of the commission's action and findings in relation to the constitutional guarantees and limitations", it was error for said District Court to find and hold the said judgment of the state court res judicata or estoppel as to the same constitutional guarantees and limitations involved and drawn in question in the bill of complaint and the amendment to the bill of complaint and issues raised in the equity suit in said District Court.

Point 7.

Said District Court erred in failing to exercise its full exclusive federal jurisdiction and power on the issue raised by paragraph 15 of the bill of complaint, as follows:

> "That plaintiff is and will be in competition in the operation of his said bus line, with all the defendant corporations and especially with one of the defendants, The Interstate Motor Transit Company, which said company is now operating between Columbus, Ohio, and Huntington, West Virginia; that

> on the twenty-first day of September, 1927, the defendant, the Public Utilities Commission of Ohio, granted to said The Interstate Motor Transit Company, the right to operate its said bus line from Portsmouth, Ohio, to South Portsmouth, Kentucky, and return, crossing and recrossing the Ohio river, over the bridge between said points, as a part of its route between Columbus, Ohio, and Huntington, West Virginia; that said certificate is still in effect and said company is still operating between said points; that said commission by its order has prohibited this plaintiff from operating over the identical route between Portsmouth, Ohio, and South Portsmouth, Kentucky, which by its order of September 21, 1927, it granted to plaintiff's said competitor; all in violation of plaintiff's right to the equal protection of the laws and contrary to the Fourteenth Amendment to the Constitution of the United States of America,"

in that by so failing to exercise its federal jurisdiction, it gave full effect to the prohibitory part of the Ohio Public Utilities Commission's order of April 2, 1928, reading as follows:

> "Ordered, that said applicant be, and hereby he is prohibited from incorporating within the regular route upon which he will herein be granted a certificate to operate within the state of Ohio, any movement which shall provide for the crossing and recrossing of the Ohio river, at Portsmouth, Ohio,"

and thereby discriminated in favor of the interstate commerce of The Interstate Motor Transit Company and against this plaintiff-appellant, J. P. Grubb.

Point 8.

The record herein showing that appellant never owned or operated under a certificate issued to him, and it being admitted in this case, that said appellant applied for

the first time to the Ohio Public Utilities Commission for a certificate and was willing to comply and obey, and has been and is now actually complying with and obeying the laws and police regulations of Ohio applicable to and concerning motor bus common carriers and that the states of West Virginia and Kentucky had granted permits to appellant to operate in interstate commerce from and to their border points and meet and connect with the interstate route applied for in the state of Ohio, said District Court erred in construing said part of the order of said Ohio commission that prohibited appellant from crossing and recrossing the bridge over the Ohio river at Portsmouth, Ohio, and also in interpreting and applying the judgment, decision and opinion and order of the Ohio Supreme Court (The Interstate Motor Transit Company, et al. v. The Public Utilities Commission of Ohio, No. 21098, filed April 19, 1928; and J. P. Grubb v. The Public Utilities Commission of Ohio, No. 21184, filed May 31, 1928, 119 O. S., 264) as res judicata or an estoppel and a bar to the suit in said District Court.

Point 9.

The District Court erred in construing and applying Section 544 of the General Code of Ohio, which section gives the Ohio Supreme Court "revisory jurisdiction" "to reverse, vacate or modify a final order of the Public Utilities Commission," and in ascribing to said Ohio Supreme Court a jurisdiction to control and regulate "commerce among the several states", and in holding the judgment of said state court in Grubb v. The Public Utili-

ties Commission of Ohio (119 O. S., 264) res judicata in this federal equity suit, for these reasons:

(a) Ohio Constitution, Art. IV, Sec. 2:

"The Supreme Court shall" * * * "have" "such **revisory jurisdiction** of the proceedings of administrative officers as may be conferred by law."

In pursuance of this constitutional grant, the Ohio general assembly has enacted the public utility code of Ohio, (Chapter I, Division II, Title III, Part First) being Sections 487 to 614-102, both inclusive, of the General Code of Ohio, which, at Sections 502, 614-89 and 614-101, in so far as applicable read:

"Section 502. (Application of act) This chapter shall apply to the transportation of passengers and property **between points within this state,**" * * * "In addition thereto the provisions of this act shall apply to regulation of any and all other duties, * * * **excepting only, that they shall not apply to the regulation of commerce with foreign nations, and among the several states, and with the Indian tribes.**"

"Section 614-89. (Applications and proceedings before the commission and Supreme Court.) In all respects in which the Public Utilities Commission has power or authority under this act (G. C., Sections 614-2, 614-84 to 614-102, and 6292), applications and complaints may be made and filed with such commission," * * * "and all proceedings before the Supreme Court of this state considered and disposed of by such court in the manner, **under the conditions and subject to the limitations** and with the effect specified in the sections of the General Code governing the supervision of other public utilities by the commission."

"Section 614-101. (Intrastate commerce only.) Neither Sections 614-84 to 614-102, inclusive, of the General Code, **nor any provision thereof, shall apply**

or be construed to apply to commerce with foreign nations or countries, or among the several states of this Union, except in so far as the same may be permitted under the provisions of the Constitution of the United States and the acts of congress."

(b) Both the commission and the Ohio Supreme Court are limited in their jurisdiction to intrastate commerce, and expressly denied jurisdiction as to interstate commerce. The attempt of the Ohio commission to prohibit exclusive interstate commerce over the Portsmouth-South Portsmouth bridge over the Ohio river to and from Kentucky was beyond and outside of the scope of its jurisdiction and discretion; to "affirm" said order in so far as the same prohibited any movement across said bridge was equally beyond and outside of the scope of the jurisdiction of the state court, and being beyond and outside the scope of its jurisdiction, the judgment of the state Supreme Court could not be nor become res judicata in the District Court of the United States.

(c) No judgment of any court can become res judicata unless that court had jurisdiction to render the judgment in question.

(d) The Ohio Supreme Court did not decide the questions presented in this cause nor had it jurisdiction to consider or decide them. (119 O. S., 264.)

(e) The Supreme Court of Ohio neither considered nor decided any federal constitutional questions in the case of Grubb v. The Public Utilities Commission. Therefore no appeal from that judgment to the Supreme Court of the United States was possible. The United States District Court erroneously found the same decision res

judicata because, so the District Court held, the Supreme Court of Ohio might have passed upon the federal question. Thus, Grubb is effectually preventing from obtaining any decision from a federal court upon the federal constitutional and interstate commerce questions involved in this cause, unless the judgment of the District Court be reversed.

(f) The plaintiff-appellant, being an applicant to operate and operating in interstate commerce solely and exclusively, is not an Ohio public utility, and the Ohio public utility code as construed and applied, has no application as to him.

Point 10.

Said District Court erred in failing to exercise its federal jurisdiction and decide the case on the issues made and proof and evidence fully and finally submitted November 10, 1928, for the reason that it was without jurisdiction and power, to permit or recognize the judgment of a state court in a revisory proceeding brought after its jurisdiction had fully attached and restraining order granted, issued and served, the judgment of the state court being rendered after the case was finally submitted in said District Court.

Point 11.

Said District Court erred in interpreting and applying the judgment of the state court as a plea in bar, and thereby permitting itself to be ousted of its federal jurisdiction, for the reason that the judgment, decision, opinion and order of the state court did not decide any federal question and hence an appeal could not be had to the

United States Supreme Court from the decision of said state court, Grubb's case in said state court being not a case of the kind in which a decision of the federal question could be had.

Subpoena and Marshal's Return.

The United States of America, Southern District of Ohio, Eastern Division.

The President of the United States of America, to the Marshal of the Southern District of Ohio, Greeting:

You are hereby commanded to subpoena the Public Utilities Commission of Ohio, William Klinger, James W. Huffman and Frank Mauller, members of and constituting said the Public Utilities Commission of Ohio, The Interstate Motor Transit Company, The Cannonball Transportation Company, The Portsmouth Public Service Company, The Ohio Valley Bus Company, The Ohio Electric Railway Company, Elsa Cantor, sheriff of Scioto county, and ..... Sheets, chief of police of Portsmouth, citizen of and resident in the the state of Ohio, if they be found in your district to be and appear in the District Court of the United States for the Eastern Division of the Southern District of Ohio, aforesaid, at Columbus, to answer a certain bill in chancery, filed and exhibited in said court, against them by J. P. Grubb, a natural person, proposing to operate interstate The Tri-State Transit Company citizen of and resident in the state of Ohio.

Hereof you are not to fail under the penalty of the law thence ensuing.

You will make due return of this writ on or before the tenth day of May, A. D. 1928.

Witness the Honorable B. W. Hough, judge of the District Court of the United States, this twentieth day of April, A. D. 1928, and in the one hundred fifty-second year of the Independence of the United States of America.

Attest:

[Seal.] H. F. Rabe, Clerk,
By C. P. White, Jr., Deputy.

The said defendants are required to file their answers or other defense in this suit in the clerk's office of said court on or before the twentieth day after service of this subpoena, excluding the day thereof, otherwise the said bill may be taken pro confesso.

(Signed) H. F. Rabe, Clerk,
By C. P. White, Jr., Deputy.

U. S. Marshal's Return.

Received this writ at Columbus, Ohio, on April 21, 1928, and served same as follows:

On April 23, 1928, served the within named The Cannonball Transportation Company, by delivering a true copy of this writ, with the endorsements thereon, to Charles Arthur, manager of said company, personally at Portsmouth, Ohio.

On April 23, 1928, served the within named The Interstate Motor Transit Company, by delivering a true copy of this writ, with the endorsements thereon, to Charles Arthur, manager of said company, personally at Portsmouth, Ohio.

On April 23, 1928, served the within named The Ports-

mouth Public Service Company, by delivering a true copy of this writ, with the endorsements thereon, to C. T. Long, manager of said company, personally at Portsmouth, Ohio.

On April 23, 1928, served the within named The Ohio Electric Railway Company, by delivering a true copy of this writ, with the endorsements thereon, to Cliff Thurma, manager of said company, personally at Ironton, Ohio;

No chief officer or higher representative of any of the foregoing named defendants found in this district upon whom to effect service.

And on April 23, 1928, served same on the within named Elza Cantor, sheriff of Scioto county, and Harry S. Sheets, chief of police of Portsmouth, Ohio, by delivering to each a true copy of this writ, with the endorsements thereon, personally at Portsmouth, Ohio.

And on April 25, 1928, I served the within named the Public Utilities Commission of Ohio, by delivering a true copy of this writ, with the endorsements thereon, to William Klinger, chairman of said commission, personally at Columbus, Ohio;

And on the same day I served the within named William Klinger, Frank B. Mauller and James W. Huffman, members of and constituting said the Public Utilities Commission of Ohio, by delivering to each personally a true copy of this writ, with the endorsements thereon, at Columbus, Ohio.

The Ohio Valley Bus Company not served; no official of said company found in this district.

Stanley Borthwick,
U. S. Marshal S. D. O.
By Jos. L. Lowey, Deputy.
By J. Norsb, Deputy.

(Unprinted Transcript, 20.)

Entry.

[Filed May 10, 1928.]

Upon application of the plaintiff and for good cause shown, the temporary restraining order heretofore issued is hereby extended to May 20, 1928, and the hearing upon the application for a temporary injunction is May 20, 1928.

Benson W. Hough.

Dated 5/8 1928.

(Unprinted Transcript, 41.)

Entry.

[Filed May 19, 1928.]

Upon application of the plaintiff and for good cause shown, the temporary restraining order heretofore issued herein is hereby extended to May 31, 1928, and the hearing upon the application for a preliminary injunction is also extended to said time.

Benson W. Hough,
Judge.

Dated May 19, 1928.

(Unprinted Transcript, 42.)

Entry.

[Filed May 29, 1928.]

Upon application of the plaintiff and for good cause shown, the temporary restraining order heretofore issued herein is hereby extended to June 11, 1928, and the hearing on the application for a temporary injunction is also extended to said time.

Benson W. Hough,
Judge.

Dated May 29, 1928.

(Unprinted Transcript, 43.)

Entry.

[Filed June 8, 1928.]

Upon application of the plaintiff and for good cause shown, the temporary restraining order heretofore issued herein is hereby extended to ....., 1928, and the hearing on the application for a temporary injunction is also extended to said time.

Benson W. Hough,
Judge.

Dated June 8, 1928.

(Unprinted Transcript, 44.)

Benson W. Hough,
District Judge.

United States District Court
Southern District of Ohio
Judge's Chambers
Columbus

Columbus, O., Oct. 5, 1928.

To Counsel of Record in the Case of Grubb v. Public Utilities Commission, et al., No. 627 In Equity:

Gentlemen: The above case is set for trial upon the merits, for Saturday, November 10, 1928, at 9:30 a. m.

The personnel of the court to be present here on that date is Hon. Charles Moorman, circuit judge, Hon. Smith Hickenlooper, district judge, and myself.

It is highly desirable that the case be prepared by counsel ready for submission at that time, and that everything be done in advance. It is desirable that an attempt be made to stipulate as many of the facts as possible, and that the facts in dispute be covered and presented in the form of depositions. It is further suggested that briefs be prepared in advance, and to that end the plaintiff's briefs should be on file on or before the twentieth of October, the defendant's briefs on or before the third of November, and the plaintiff's reply brief by the hearing date.

It must be remembered that it is quite difficult to arrange for the constituting of a three judge court under Section 266 of the Civil Code, in that it disturbs the set program of three separate courts. This is the reason that the above arrangements have been made, and it is hoped that the entire co-operation of all counsel concerned may be secured.

Respectfully,
(Signed) Benson W. Hough,
U. S. District Judge.

(Unprinted Transcript, 136.)

In the District Court of the United States, Southern District of Ohio, Eastern Division.

J. P. Grubb, Etc., Plaintiff,
vs.
The Public Utilities Commission of Ohio, et al., Defendants.
No. 627 In Equity.

Testimony.

Taken before Honorables Charles N. Mooreman, Smith Hickenloqper and Benson W. Hough, judges of the United States District Court, on the tenth day of November, 1928.

Present:

Messrs. Frank M. Raymund and John F. Carlisle, on behalf of the complainant.

Mr. A. Z. Blair, representing The Interstate Motor Transit Company and The Cannonball Transportation Company.

Mr. A. R. Johnson, representing The Portsmouth Public Service Company and The Ohio Valley Bus Company.

Saturday Morning Session, November 10, 1928.

Mr. Raymund: If the court please, we have been taking depositions and by stipulation have offered a large number of exhibits which your Honors have before you. There is just one other point that will involve probably three or four questions from one witness that we would like to have added to the testimony before arguing the case.

Judge Moorman: Call the witness.

J. P. Grubb

called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Raymund.

I am J. P. Grubb the plaintiff in this case and am now operating an interstate motor bus line between Columbus, Ohio, and Huntington, West Virginia. I do not sell tickets to passengers from any point in Ohio to any other point in Ohio. I do not as a matter of practice in fact carry passengers from any point in Ohio to any other point in Ohio. I do not sell tickets or carry passengers from any point in Kentucky to any other point in Kentucky, and I do not sell tickets or carry passengers from any point in West Virginia to any other point in West Virginia.

Cross Examination by Judge Blair.

I pay toll for my busses and passengers over the bridge over the Ohio river between Portsmouth, Ohio, and Kentucky. The toll is thirty cents per bus and five cents per passenger, that is to say, thirty cents per bus for across each way, and I pay both ways.

I believe I met a man by the name of Griffith in Huntington, the day before we had the hearing at Portsmouth. I never directly or indirectly had any communication with him prior to that time, nor did any one else for me.

Judge Hickenlooper: Is your line from Columbus, Ohio, to Huntington, West Virginia?

The Witness: Yes.

(Unprinted Transcript, 137 and 138.)

Excerpts from Testimony of J. P. Grubb.

J. P. Grubb,

of lawful age, being first duly sworn, testified as follows:

Direct Examination by Mr. Raymund.

My name is J. P. Grubb, and I am the plaintiff in this case. I am now engaged in the transportation of interstate passengers from Columbus, Ohio, to Huntington, West Virginia, and operate that business under the tradename of The Tri-State Transit Company.

I am a citizen of the United States, and at the time I filed this action I resided at Portsmouth, Ohio, but now I reside in Huntington, West Virginia. When I filed my bill of complaint I proposed to operate an interstate bus line from Columbus, Ohio, to Huntington, West Virginia. On January 23, 1928, I filed an application with the Public Utilities Commission of Ohio for a so-called certificate of convenience and necessity for permission to operate motor busses carrying passengers for hire in interstate commerce only. The hearing on my application was had March 13, 1928, before the Public Utilities Commission of Ohio. I proposed, after getting the permission applied for, to put in operation eight busses, seven regular and one emergency. When I had my hearing I was able and willing to pay all taxes to the state of Ohio, required by its laws, and also taxes to the states of Kentucky and West Virginia required by their laws. I also told the commission that I was willing to obey all police regulations of Ohio and offered to do so. There were counsel there for opposing companies but I can not say there

were any written protest. These counsel were there protesting, and they are the same companies that are the defendants in this case. At the conclusion of the hearing the commission granted my application from the bench, saying "granted as prayed for, to become effective April 1, 1928." When the order came out from the commission it said that it was not to begin operation until May 1, and the portion of the route from Portsmouth, Ohio, to South Portsmouth, Kentucky, and return, would not be granted. I again applied to the commission to change the order and they changed it to become effective April 17, I believe. I wanted my Ohio permit to become effective before my Kentucky permit would become void.

The busses were purchased before my Ohio hearing but I, after the hearing, relying on what the commission said, made all plans to begin operations and got my crew lined up and hired. I started operations April 25, 1928. Before this date I filed this suit and a temporary restraining order had been issued in this suit restraining the defendants from interfering with the operation from Portsmouth, to South Portsmouth and return, over the bridge that was finished in the summer of 1927. Portsmouth has a population of about 60,000. At South Portsmouth, Kentucky, and on the Kentucky side for a distance, within a two miles radius from the end of the bridge in Kentucky, there live from 6000 to 7500 people approximately. Everyone has a different opinion and there is no way to get a real accurate * * *. The different places go under different names, such as, South Portsmouth, Fullerton, Firebrick,—there are some three or

four villages altogether comprising about 6000 people. South Portsmouth is important from a traffic standpoint, the Chesapeake & Ohio Railroad having its depot in South Portsmouth, Kentucky, through which people come and go. As to the number of people, I can best answer by saying that this railroad company wanted someone to contract to operate a bus, hauling passengers, from Portsmouth to South Portsmouth and return, and they give the figures as passengers, 4000 per month. Before the hearing before the Ohio commission I knew that South Portsmouth was an important point for traffic for busses, having learned this when I was manager of The Interstate Motor Transit Company. The Interstate Motor Transit Company is a corporation and operates this identical same route to South Portsmouth, Kentucky. I was manager of The Interstate Motor Transit Company when the bridge was finished, and very shortly after the bridge was finished we got permission from the Ohio Public Utilities Commission to operate over the new bridge to South Portsmouth, Kentucky. Shortly after we began to operate over that bridge there was considerable increase in our gross receipts. I would approximate this increase between $3000 to $3500 per month. At that time I had access to the records of The Interstate Motor Transit Company. This "Exhibit No. 1" is the transcript of the hearing before the Public Utilities Commission of Ohio, in the matter of my application to operate a motor bus line from Columbus to Huntington. In that hearing I was examined by Mr. Bannon regarding that part of the route between Portsmouth, Ohio, and South Ports-

mouth, Kentucky. None of the other attorneys questioned me on that subject. Portsmouth, Ohio, is separated from South Portsmouth, Kentucky, by the Ohio river. There is a bridge across there and one can go across in a very short time, depending on how you go. My purpose in my application to the Ohio commission was to carry passengers down the Scioto valley by U. S. Route 23 and deliver them at South Portsmouth, Kentucky, but I did not apply to carry passengers whose whole and complete ride was between Portsmouth, Ohio, and South Portsmouth, Kentucky. I could not carry a passenger from Columbus, Ohio, to Portsmouth, but I could carry a passenger from Columbus to South Portsmouth, but I could not carry that passenger from South Portsmouth back to Portsmouth, because I did not so apply. I never had any arrangement to get passengers between Portsmouth and South Portsmouth. My busses will travel from South Portsmouth back to Portsmouth but will carry no passengers whose whole and complete ride is between Portsmouth, Ohio, and South Portsmouth, Kentucky. The roads on the Kentucky side from South Portsmouth to Russell are not yet in condition to operate a bus line, and it may be some time yet before the road is sufficiently improved.

My rate schedule filed with my application to the Ohio commission shows rates from South Portsmouth, Kentucky, to New Boston, Sciotoville and Wheelersburg, and on through Ohio, and I applied to carry passengers from South Portsmouth to and through New Boston and points east, but I will not take such passenger if I know he was

going to get off in Portsmouth, Ohio. I will operate over the bridge just as we did when I was president and general manager of The Interstate Motor Transit Company.

There was no other testimony before the commission at my hearing on the question of so-called subterfuge in my applied for route as described in my application from Portsmouth to South Portsmouth and return.

My busses go across the bridge to the south end of the bridge, which is about 2½ or 3 squares from the C. & O. Railway depot. Numbers of passengers from the C. & O. Railroad take my bus where I turn around. These passengers take passage from South Portsmouth, Kentucky, to all points on my entire route except to Portsmouth, Ohio, that is from South Portsmouth to all points in compliance with my tariff. We have no tariff from Portsmouth to South Portsmouth and from South Portsmouth, Kentucky, to Portsmouth, Ohio. In going south I take no passengers on the bus after leaving Lucasville, Ohio, and coming north, I take on no passengers for South Portsmouth after leaving New Boston. The C. & O. Railroad furnish free bus transportation for their passengers between Portsmouth and South Portsmouth, that is, if a passenger buys a C. & O. Railway ticket he gets transportation across the bridge. Before the bridge was built there were two steam ferries operating across the Ohio river at Portsmouth. Before the bridge was built The Interstate Motor Transit Company had a joint time and tariff schedule with the L. & L. bus line, which bus line operated from Portsmouth, Ohio, to Fullerton, Kentucky, and down to Maysville, Kentucky. This joint tariff was

filed with the Ohio commission, and we would sell transportation to any point over the L. & L. bus line, and L. & L. bus line would sell transportation over the route of The Interstate Motor Transit Company. At the time I was manager of The Interstate Motor Transit Company the L. & L. bus would come over to Portsmouth by ferry. Passengers would buy tickets for the Kentucky side and we would bring them to the L. & L. bus, but instead of boarding the bus they would walk away. Objections were filed against The Interstate Motor Transit Company with the Ohio commission. A hearing or conference was had and at the commission's request we discontinued the joint tariff and the practice until the bridge was completed. After the bridge was completed and while I was president and general manager, we applied to extend our route and run across the bridge to South Portsmouth from Portsmouth. The Ohio commission granted our extension and amended our certificate so that the privilege of crossing the new bridge was granted to The Interstate Motor Transit Company. The Interstate Motor Transit Company has ever since and is now running its busses across the bridge to South Portsmouth, Kentucky, to the same point at the south end of the bridge as I applied to do, and The Interstate Motor Transit Company turns its busses around there at the south end of the bridge also. They also take passengers and discharge passengers at that point. The Cannonball Transportation Company and the South Portsmouth bus line also run across the bridge. The C. & O. bus crosses the bridge and goes down to the C. & O. depot. The

Portsmouth-South Portsmouth bus goes down some couple of squares from the Kentucky end of the bridge and turn, and then go up the river a short distance to Fullerton. The Cannonball crosses the bridge, goes up to Fullerton and turn and then come back across the bridge.

The nearest bridge to the Portsmouth-South Portsmouth bridge is up the river about 30 miles, between Ironton, Ohio, and Russell, Kentucky. Down river the nearest bridge is across the Ohio river at Cincinnati, about 113 miles by the Ohio river. There are towns of considerable importance on both sides of the Ohio river up and down from Portsmouth. There is considerable population on both sides of the river up and down river from Portsmouth. The population is all along the river on both sides. The new bridge between South Portsmouth and Portsmouth is the gateway between Ohio and Kentucky by considerable number of people. It is the only means to go across for a considerable distance without the ferries. There is a ferry 20 miles up the river from Portsmouth, and there is a little daylight ferry down the river. There is another down the river at Maysville, which is 50 miles.

The route I applied for in my application to the Ohio commission was for **interstate traffic only**, and the portion of the route over the new bridge at Portsmouth, Ohio, to Kentucky **was only for interstate hauling of passengers and for no other purpose. I do not haul intrastate passengers in Ohio at all, and I do not haul intrastate passengers in the states of West Virginia and Kentucky. I could not carry a passenger from Portsmouth, Ohio, to**

Columbus, nor from Columbus, Ohio, to Portsmouth, Ohio, because such a passenger would be intrastate; nor could I carry a passenger from Portsmouth, Ohio, to any other point on my line in Ohio. A passenger who bought a ticket from Columbus, Ohio, to South Portsmouth, Kentucky, could not get off the bus at Portsmouth for the reason that there is no stop in Portsmouth for passengers, neither to let passengers off or on. We go direct to South Portsmouth before making any stops. If I am prohibited from crossing the bridge either way I could not haul any interstate passengers on my busses who wanted to come to South Portsmouth. If I am prohibited from crossing this bridge I could not carry any passenger from Columbus and way points to any point in Kentucky, except Russell, Kentucky, and points from there to Huntington. In other words, I would be prohibited from carrying any passengers bound for other points in Kentucky and points from there to Huntington, if I wouldn't cross the bridge at Portsmouth to South Portsmouth.

I recall the statement of Judge Blair of the amount of traffic which The Interstate Motor Transit Company gained from crossing the bridge from Portsmouth to South Portsmouth and return. Judge Blair said that that was why the receipts picked up the latter part of 1927, additional business from and to South Portsmouth. Judge Blair in the hearing before the commission stated that the increase from the traffic to The Interstate Motor Transit Company over the Portsmouth-South Portsmouth bridge approximated $3000 per month.

After the Ohio commission made its order and before I began to operate the corporation defendants, other than the commission, brought an injunction suit against me and the commission in the Common Pleas Court of Scioto county, Ohio.

To the best of my knowledge nothing has been done in that case since the suit in the United States District Court was filed. The corporation defendants, who were protestants before the commission took appeal to the Supreme Court of Ohio. On April 25, 1928, I began to operate my bus line under permission granted by the Utilities Commission of Ohio, the commissioner of transportation of Kentucky and the officers of the state of West Virginia. I have been operating my bus line continuously since that date and am operating it now. I have not directly or indirectly offered to sell my bus line or permits to any of the defendant companies or to any one else since I began to operate, and I had never offered to sell them before, and have not done anything looking to a sale of my property or franchise to any person,—and there has been no negotiations with me or anyone representing me for the purchase of my bus line. Although charged, I did not obtain my permits and start this bus line with the intention of compelling the defendants or some of them to buy me out.

The first of the various companies started was The Cannonball Transportation Company. At first it run from Portsmouth to Ironton, Ohio; later to Huntington, West Virginia, and later to Chillicothe, Ohio. It now runs from Chillicothe to Portsmouth, to Ironton, to Ash-

land, Kentucky, to Huntington, West Virginia. The one that runs from Portsmouth, Ohio, to South Portsmouth, Kentucky, is just a short line between there. It is all Cannonball Transportation Company. The next company started was The Interstate Motor Transit Company. I started the Cannonball. I sold the Cannonball before they started the Interstate. I did not start the Interstate. The Interstate was incorporated by people of Chillicothe when I was not interested in the Cannonball, having been out of the Cannonball for some eleven months. I later became manager of the Interstate. In February, 1927, The Interstate Motor Transit Company bought the Cannonball company back from the Williams interests.

On December 23, 1927, I turned in my resignation to become effective not later than January 15, 1928, and I continued as manager until January 15, 1928. I sold my stock in the companies February 2, 1928. On January 23, 1928, I filed my application for a permit with the Public Utilities Commission of Ohio to operate as The Tri-State Transit Company.

Mr. F. M. Semsworth of Huntington, who was manager of other companies for the Chicago Public Service, is manager of The Interstate Motor Transit Company.

When I began operating as The Tri-State Transit Company I operated seven busses and one additional bus. Now I operate ten and one extra, a total of eleven, this one is for reserve. I maintained a constant schedule over this route, increasing the number of busses from time to time. There have been changes in the rates since

I began to most points. Rates have been cut. When I began my rates were some little less than the Interstate as they were considerable higher than the Cannonball, and then after I began operation the Interstate and Cannonball and Ohio Valley have all cut, and I met their cut, and they cut again and I met it. I am talking now of the Interstate. I met the Interstate cut all the way through. When I began the one-way rate from Columbus to Huntington was $4.45. Now it is $4.40 round trip. The short ride rates have been cut some but not quite as much proportionately.

I still hold the permit granted by the department of motor transportation of Kentucky, Number 2204. That was granted me before I obtained permit from Ohio. The Kentucky permit granted me, operating under the trade-name of The Tri-State Transit Company, and is dated January 30, 1928. I applied in all three states about the same time.

The corporation defendants or their officers threatened that if I obtained a permit to run this bus line, that they would law me to death, break me up, put so many busses on the road there wouldn't be no chance for mine; I didn't have any means to start a bus line, couldn't get started, that they would law me to death. The manager of the Interstate and the Cannonball and the Ohio Valley threatened that they would put so many busses on the road that there would be no room for me. Mr. Semsworth made these threats. He was manager of these three companies.

The threats of lawing me to death, that is, breaking

me up lawing and all was made up by the attorney for The Interstate Motor Transit Company and The Cannonball Transportation Company. That attorney's name is Judge A. Z. Blair.

Judge A. Z. Blair, attorney for The Interstate Motor Transit Company and The Cannonball Transportation Company, made these statements about the time I was making application for this line to my attorney, Mr. Edward G. Miller, and Judge told him that I didn't have any money, nobody to back me, that I wouldn't get a permit, and that if I did get it that these other companies would law me to death, they were going to take me through the U. S. federal court, give me a taste of that, see how I liked it.

After injunction suit in Scioto county Common Pleas Court was begun I was served with a subpoena. That subpoena commanded me to come to Judge Blair's office and bring all my books, papers, contracts, promissory notes and correspondence. I did not appear.

I became interested in motor bus transportation in the vicinity of Portsmouth to Huntington the first of March, 1923. Before that I was in the automobile and tire business. I am familiar with the district from Columbus, Ohio, to Huntington, West Virginia. The business has increased rapidly for the past five years and is still increasing rapidly. In May, 1928, we hauled 3458 full fare and 20 half fares; in June, we hauled 6089 full fare and 150 half fares; in July, we hauled 9684 full fares and 170 half fares; in August, we hauled 12,043 full fares and 170 half fares; in September, we hauled 16,565 full fares and

126 half fares. That is the increase in passengers, while the revenue increased per day and per mile in accordance. During this same period The Interstate Motor Transit Company increased their seating capacity from 14 passenger busses to 29 passenger busses, and the same number of busses as before. As I heretofore stated I increased my equipment also.

The Tri-State Transit Company is not a corporation. It is simply a trade-name which I adopted and under which I have been operating.

The eight seventeen-passenger busses for my original operation cost $37,405.52, f. o. b. factory without the equipment on them, with the equipment ready to go in service they cost $5000 each. I paid the manufacturer for those eight busses. Two of the three additional busses were practically the same prices and one, deck and a half bus, cost more. I have over $55,000 invested in busses.

(Unprinted Transcript, 149.)

The dividing line between Ohio and Kentucky is low water mark on the Ohio side at both Portsmouth and Ironton. In passing from Portsmouth to South Portsmouth we go over the Portsmouth, Fullerton, South Portsmouth bridge.

(Unprinted Transcript, 150.)

The Interstate Motor Transit Company had a joint tariff with the L. & L. Bus Line which had to do with passengers going across the Ohio river at South Portsmouth. An injunction suit was brought against The In-

terstate Motor Transit Company and myself, operating The Interstate Motor Transit Company, under the board of directors and the attorneys. I did just what I was advised by the attorneys in the operation. Judge A. Z. Blair was the attorney for The Interstate Motor Transit Company as he is now. He was not my personal attorney. He was attorney for the company, and I have different documents here in regards to what to do, and when to do it, in regard to the injunction, drawn up by Judge Blair. The action was the result of the action of passengers rather than the company. The suit was by Public Utilities Commission. The injunction was to prevent The Interstate Motor Transit Company from carrying passengers in intrastate trade. We had not been carrying passengers in intrastate trade. We kept right on just as we had been. We continued to run to Fullerton just as before. We didn't cease operations on that. We had not carried passengers in intrastate trade. The other company, The Scioto Valley Traction, employed "stool pigeons" riding the busses and they claimed they could do all the different things, things of that kind, we hadn't, we continued right along as we had there before. Judge Blair told me what we could continue to do,—he mapped it out for me, and I did just as he told me to do. The Interstate Motor Transit Company was a corporation and I was its agent. There was no bridge in existence at the time. After the bridge was built the Public Utilities Commission of Ohio gave this same Interstate Motor Transit Company the right to cross there and recross the bridge. Some time before that, the commission

wrote us and Judge Blair, Mr. Ault and myself came up and talked it over with Mr. Huffman, one of the commissioners. Mr. Huffman asked us to discontinue the Fullerton operation until the bridge was completed, that competing lines were complaining and to cease operations until the bridge was finished and then everything would be all right. And we did so. When the bridge was completed we applied and then the Ohio Public Utilities Commission granted The Interstate Motor Transit Company the right to cross the bridge.

(Unprinted Transcript, 153.)

Cross Examination of J. P. Grubb by A. R. Johnson.

My bus operations are those from Columbus to Huntington and I am the sole owner of and interested in The Tri-State Transit Company. It is not a stock company and I have not issued any shares to any person. There is a mortgage on some equipment, but I have issued no interest to any person. Before I applied to the Ohio commission for my license I had not purchased nor contracted for my equipment, but before the hearing I had placed the order for eight busses and an option on a ninth bus. When I placed the order I knew the price of the busses. Since I got my eight busses and after I began operations I purchased three busses from the Studebaker corporations.

(Unprinted Transcript, 154.)

From the Kentucky end of the bridge at Portsmouth for the five days of April, 1928, to and from I hauled 75 for the five days of April. I cannot give you how many

went from Ohio and how many came back from Kentucky separately from this record. It gives the number of passengers in both directions. I check over all of the records. My original receipts will show how many (Unprinted Transcript, 155) passengers went to what we call South Portsmouth, Kentucky, and how many came back from South Portsmouth, for the months of May, June, July, August and September, 1928, but I don't care to produce the original receipts. I could if my counsel thought proper.

(Unprinted Transcript, 155.)

I became interested in The Interstate Motor Transit Company November 20, 1925. I continued to work until January 15, 1928, and was succeeded as manager by Charlie Ault. I continued as stockholder until February 2, 1928, selling my stock to Arthur H. Bannon. I went out as director some time between January 16, 1928, and February 2, 1928.

(Unprinted Transcript, 156.)

The Interstate Motor Transit Company acquired the Cannonball when I was general manager and working man of it. I was not the one man in it. Arthur Bannon, Charlie Ault and Judge Blair had lots to say in it. Bannon became interested in it in June, 1926.

(Unprinted Transcript, 158.)

My busses cost approximately $55,000.00.

(Mr. Raymund: Object, as the matter has been fully covered.)

(Unprinted Transcript, 161.)

I would like to make a correction as to passengers crossing the bridge to and from South Portsmouth, Kentucky, they should be for May, 1928, 527 full and 2 half fares; June, 1928, 744 full and 16 half; July, 1003 full and 31 half; August, 1216 full and 31 half; September, 1315 full and 22 half fares. I am familiar with the new bridge at Portsmouth and lived in Portsmouth when it was built.

After crossing the bridge to South Portsmouth there is the highway up and down on the Kentucky side and a little distance from this road there is a wooded hill. There are houses there and also houses all along there. There is a house on the hill a short distance from the end of the bridge.

(Mr. Carlisle: Objection, because you couldn't expect all the houses in Kentucky to be at the end of the bridge.)

(Unprinted Transcript, 162.)

I can't give now the passengers to and from South Portsmouth, Kentucky, from October 1, to October 15, 1928, for the reason that I have it compiled from October 1, to October 27. I have it by the day. If the court wants it I will give it by the day to them and give the ticket that goes with it. The reason I will not is because I am not giving my records out for a lot of rabbit hunters, but I will give the court any records they want. I have the total number of passengers carried to South Portsmouth and from South Portsmouth, to October 27, 1928, this present month, the total of it, and I have each and every day. If the court wants it, I will give it to the

court, gladly, but I will not give it to rabbit hunters. By rabbit hunters I mean a bunch of competitors. I am willing to submit any facts, figures or statements to the court, but not to a competitive bus line.

(Unprinted Transcript, 163.)

Mr. Grubb: The number of passengers that either got on or off my busses, to or from the Kentucky end of the bridge from October 1, to October 15, 1928, was 451 full fares and 3 half fares; and October 16, to October 27, 1928, both inclusive, 464 full fares and 4 half fares.

Redirect Examination of J. P. Grubb by Mr. Raymund.

The route granted me by the Ohio Utilities Commission runs from Columbus south over United States Route 23 where it connects with Route Number 52 in Portsmouth. They connect in Portsmouth at the Ohio end of the bridge at the intersection of Chillicothe and Second streets. This intersection is, in my judgment, not to exceed 200 feet from low water mark on the Ohio side. This low water mark is the boundary between the states of Ohio and Kentucky.

(Unprinted Transcript, 164.)

I have a permit from the state of Kentucky which gives me the right to operate from South Portsmouth, Kentucky, to and through Portsmouth, Ohio. In my best judgment the total length of the bridge is around 1500 feet.

The Interstate Motor Transit Company has increased the carrying capacity of its busses. They are listed with the Ohio commission as 29 passenger. They are 90

inches wide and weigh around 5800 pounds without any load or equipment, and are from 36 to 38 feet long.

(Unprinted Transcript, 165.)

I operate my smaller busses over identically the same route that The Interstate Motor Transit Company operates thereon. The Interstate Motor Transit Company put on their large busses the first of this month, beginning October 28.

The bridge from Portsmouth to South Portsmouth over the Ohio river is owned by a corporation known as the Fullerton-Portsmouth Bridge Company, Pittsburg office, 302 Penn avenue, Dravo building. It is a toll bridge and we pay toll on all our busses. They have a schedule for different types of vehicles, trucks, wagons, horse and rider and motor vehicles. We pay according to that tariff. The territory from Portsmouth to Huntington, except about 12 or 15 miles between Portsmouth and Ironton, is all built up on the way. It is practically one town, except a few little gaps.

Regarding complaints against The Interstate Motor Transit Company charging that it carried intrastate passengers at Portsmouth, there was an agreement between that company and the Public Utilities Commission at Columbus. The secretary of The Interstate Motor Transit Company, its attorney, and myself, as president and general manager, went to Columbus for a conference in regards to the operations in connection with the L. & L. Bus Line. This bus ran over the ferry between Portsmouth and Fullerton. It had certificate to Maysville, Kentucky, but (Unprinted Trancript, 165) only ran as

far as Garrison, Kentucky, because of the road condition. The Ohio commission asked us to discontinue this connection with the L. & L. bus for a short time until the bridge was completed, and then make our application to cross the bridge to South Portsmouth, and we could in no way be accused by other carriers in any way of a subterfuge.

The two copies of letters handed to me, one dated July 29, 1927, from Blair & Ball, attorneys, to the Public Utilities Commission of Ohio, and one from the Public Utilities Commission of Ohio to Blair & Ball, dated August 1, 1927, concern matters which were brought to my attention when I was manager and president of The Interstate Motor Transit Company. There were conferences between myself and other members of the corporation and attorneys for the corporation in regard to extending the line from Portsmouth, Ohio, to South Portsmouth, Kentucky, as the bridge was nearing completion, and the attorneys were of the opinion that there would be no necessity of making application to the Public Utilities Commission of Ohio, as the extension was wholly within the city of Portsmouth, Ohio, and that the Ohio commission was without jurisdiction, the same as had been the case at Ironton, Ohio. I am conversant with all those matters. Following the exchange of these letters The Interstate Motor Transit Company was granted a permit by the Public Utilities Commission of Ohio, from Portsmouth, Ohio, to South Portsmouth, Kentucky. It was granted and put in operation. The original letter from Blair & Ball is on file with the Public Utilities Commission of Ohio and I have seen it there. The copy of the letter

from the Public Utilities Commission of Ohio to Blair & Ball is on file and in the records of the Public Utilities Commission of Ohio.

Mr. Raymund: We offer the two letters in evidence, marked "Plaintiff's Exhibit 12" and "Plaintiff's Exhibit 13," and are hereto attached.

Mr. Grubb: I was not a party to the complaint referred to in the opinion of the Public Utilities Commission of Ohio, where it granted me the right to run from Columbus to Huntington, but prohibited me from running over the bridge to South Portsmouth, Kentucky. I was not personally a defendant in that complaint.

(Unprinted Transcript, 166.)

The complaint was against the corporation, The Interstate Motor Transit Company, a corporation. I was not at any time made personally a party in that complaint. The Scioto Valley Railway & Power Company filed the complaint.

(Unprinted Transcript, 167.)

J. P. Grubb Recalled for Further Cross Examination by A. R. Johnson.

Mr. Grubb: There was subpoena in my mail box, and the state law says that I would be arrested if I started this bus line, I was threatened with arrest in this way if I did start operation in the state of Kentucky there would be a fine of $10 to $1000 a day, when they revoked my certificate. There is a letter from them. The state of Kentucky said that if I did operate I would be subject

to a fine. That was a letter received from the Kentucky department. Nobody in Ohio threatened to arrest me because I hadn't begun operation.

Redirect Examination by Mr. Raymund.

Mr. Grubb: I knew that persons were continually being arrested for violating the state highway laws of the state. That is the law, plain.

(Counsel for defendant: We move to strike out as incompetent and irrelevant.)

Mr. Grubb: The order did actually prohibit me from operating over this bridge and I knew that it did, sure.

(Unprinted Transcript, 176.)

Charles Noel, Being Sworn, Testified as Follows for Defendants.

Direct Examination by A. Z. Blair.

Charles Noel: My name is Charles Noel, residence Portsmouth, Ohio, and for five years have been county surveyor, I have made measurements concerning the bridge between Portsmouth and the Kentucky shore within a week. The distance from the south end of the bridge to the C. & O. depot is 2000 feet. There were 37 houses on each side of the road. I learned that 104 people lived in these houses, I also counted 12 houses around the depot in which 48 people live. From the Kentucky end of the bridge up-river to the Davis hotel in Fullerton is 5825 feet. I did not count the houses along the road. I investigated the population of Fullerton and three or four people told me there were in the neighborhood of 1600. The distance from the ferry landing in Fullerton

to the Kentucky end of the bridge is 4600 feet. There is another ferry in operation about a mile above the Fullerton ferry. I judge it is about 18 miles from the south end of the bridge to Greenup, Kentucky.

(Unprinted Transcript, 171.)

I made measurements with regard to the bridge. From low water mark on the Ohio side to the south end of the bridge is 1612 feet. The entire length of the bridge is 2324 feet from the junction of Chillicothe street and Second street to the south end in Kentucky and from said junction to low water mark on the Ohio side is 712 feet.

Cross Examination by Mr. Carlisle.

Charles Noel: The road from Portsmouth east to Ironton, up-river is a Federal Aid road, and it intersects United States Highway Number 23. These roads connect right at the north end of the bridge. The approach to the bridge is all improved highway, wide and up to date, I don't know about bus lines operating across the bridge. There is a Kentucky highway on the Kentucky shore that runs through Fullerton and on past the C. & O. depot. It runs all along there. The houses I mentioned are along the highway. The bus terminal is at the end of the bridge and the C. & O. railway depot is at South Portsmouth. The railway have a depot there. The railroad is quite a considerable system. Up to September, 1927, or about that date, there was no bridge between Portsmouth and the Kentucky shore. I was county engineer when it was being built. There was need for the bridge and it is used by the public. Outside of the ferries the bridge is the only gateway for some considerable dis-

tance up and down the Ohio river. The name of the county in Kentucky crossing from Portsmouth is Greenup county and it is a pretty good sized county, I don't know what the bridge cost, I have lived in this county practically all my life. For many years there was prior to building this bridge considerable talk on the part of the public desiring a bridge here, it was finally ended with the building of the bridge.

Redirect Examination by A. Z. Blair.

Charles Noel: Before the bridge was built there was a C. & O. ferry, the ferry from Market street to the Kentucky side and the Fullerton ferry. The Fullerton ferry is there yet. On the Kentucky side they are improving the highways but I am not familiar with the Kentucky highway system.

Recross Examination by Mr. Carlisle.

Charles Noel: There are roads that lead from Fullerton, improved roads, they are working on them now.

(Unprinted Transcript, 172.)

Deposition of Griffin Kelly, on Behalf of Defendants, Taken at Frankfort, Kentucky, May 7, 1928, and Filed May 10, 1928.

Direct Examination by Mr. Ball.

Griffin Kelly: My name is Griffin Kelly, age 59, residence Franklin county, Kentucky. Am commissioner of motor transportation of the state of Kentucky and have been for two years. Under the Kentucky bus law enacted by the general assembly of Kentucky in 1926, as such commissioner I have authority to grant or refuse

certificates. The paper marked as "Exhibit A" is a certified copy of such a certificate, or permit, which my department issued to The Tri-State Transit Company, James P. Grubb, manager. The certificate was granted January 30, 1928, and there has been no changes in the same. Should The Tri-State Transit Company or James P. Grubb fail to operate from Portsmouth, Ohio, to South Portsmouth, Kentucky, and thence to Portsmouth, Ohio, the certificate would be vacated as to that part.

(Mr. Raymund: Objects as incompetent, irrelevant and immaterial.)

Such failure would not affect the rest of the certificate.

(Mr. Raymund: Same objection and for the same reason.)

Cross Examination by Mr. Raymund, Attorney for Plaintiff.

Mr. Kelly: The Cannonball Transportation Company operates from Portsmouth, Ohio, to South Portsmouth, Kentucky, and return. They were granted a permit to do this about April 25, 1928. The Interstate Motor Transit Company has no certificate to (Unprinted Transcript, 177) operate between Portsmouth, Ohio, and South Portsmouth, Kentucky.

(Objected to by defendant.)

It has a certificate from Charleston, West Virginia, to Columbus, Ohio, via Ashland and Russell, Kentucky, Number 2053, granted December 27, 1927, for the year 1928. The road between Russell and Greenup, Kentucky, is a very good road and the road between Greenup and

South Portsmouth can be operated over in dry weather, but as to wet weather, I have no report on that.

(Objected to by defendant.)

(Unprinted Transcript, 178.)

(Duplicate)

Copy.

Exhibit "A."

Commonwealth of Kentucky
Department Motor Transportation
1928
Interstate Passengers Only

Permit No. 2204 Frankfort, Ky., January 30, 1928.

Tri-State Transit Company (James P. Grubb, manager) having complied with the law and regulations of the commissioner, a certificate of convenience and necessity to operate a motor bus line is hereby granted to said company. From—Huntington, West Virginia. To—Columbus, Ohio; via Kenova, W. Va., Catlettsburg, Ky.; Ashland, Ky.; Russell, Ky.; Ironton, Ohio; Portsmouth, Ohio; to South Portsmouth, Ky., to Portsmouth, Ohio; to Columbus, Ohio, through the following counties: Boyd and Greenup county, Kentucky. Said operation to begin immediately. Said bus line is authorized to use a sufficient number of busses of the proper seating capacity to maintain the schedule as outlined on the reverse side of this certificate. If said operation is not started within sixty (60) days (the time specified by law) from date said operation is specified to begin in this certificate, same shall become null and void.

(Seal) Griffin Kelly,
Commissioner of Motor Transportation.

(Reverse Side of Certificate)

Schedule

Leave Arrive Fare

As per printed schedule attached.

This schedule is subject to change by the commission of motor transportation of the state of Kentucky if it conflicts with any other schedule over the same route. The within permit is granted to handle interstate passengers only, and any violation of this provision will automatically revoke this permit.

Griffin Kelly, Commissioner.

I hereby certify that the foregoing is a true and correct copy of the permit granted to The Tri-State Transit Company on file in the department of motor transportation of the state of Kentucky.

James E. Cantrill, Assistant Commissioner.

(Unprinted Transcript, 179.)

Narrative Statement of Plaintiff's Exhibit No. I, Which Exhibit Contains the Testimony Adduced at the Hearing on the Application of J. P. Grubb, Before the Public Utilities Commission of Ohio, at 10 A. M. March 13, 1928, Honorable William Klinger, Chairman, J. W. Huffman and Frank B. Maullar, Composing Said Commission, Sitting.

Morning Session, Tuesday, March 13, 1928.

Beginning on page 6 of said Plaintiff's Exhibit No. I.

James P. Grubb, Being Duly Sworn, Testified as Follows:

Examined by Mr. Carlisle.

My name is James P. Grubb, residence, Portsmouth, Ohio, having lived there more or less all the time since 1914. I am seeking an interstate certificate to carry on an interstate business under the trade-name of Tri-State Transit Company.

I filed this map with my application and my route just described is indicated by a red line. I know United States Highways Nos. 23 and 52 are Federal Aid roads.

I propose to operate busses carrying passengers. There will be eight Studebaker 17 pass. parlor cars, seven used and one in reserve. There will be seven trips in each direction daily beginning at 6 o'clock and every two hours on the even hour until 6 p. m.

(Unprinted Transcript, 180.)

I propose to carry interstate passengers only; passengers whose ride is from one state into the other, or a

passenger whose ride is through one state into another; passengers traveling from one state into the other. I will not carry any passengers whose complete ride is in Ohio.

I am willing to comply with all the statutes and laws and regulations in Ohio, so long as such statutes and regulations in Ohio are not a burden on interstate commerce, and that is the way I apply. I will pay taxes on my vehicles and comply with the laws of Ohio in that respect.

The paper writing handed me is a sworn statement of my financial standing as of March 10, 1928. The signature is mine and the statement is correct to the best of my knowledge. (The statement marked Applicant's Exhibit "H" admitted in evidence.)

Chairman Klinger: I notice counsel ask the witness a question how long he would comply with the rules and regulations imposed by the Utilities Commission. You of course understand that as long as the impositions and burdens are no different from those imposed upon intrastate service you are expecting to comply with them?

Grubb, the Witness: Yes, sir.

Chairman Klinger: Is that your understanding?

The Witness: Yes, sir.

Chairman Klinger: I didn't know whether there was any special reservation contemplated by the question or not.

Mr. Carlisle: I just wanted to bring it fully within the decision in the Buck case.

Cross Examination by Blair.

My business prior hereto was operating motor busses, beginning with The Cannon Ball Transportation Company from Portsmouth, Ohio, to Huntington, West Virginia (Unprinted Transcript, 181), and then later with The Interstate Motor Transit Company from Columbus, Ohio, to Charleston, West Virginia, and The Cannon Ball Transportation Company from Chillicothe, Ohio, to Huntington, West Virginia. I began with the Cannon Ball April 1, 1923, and was with it until December 9, 1924, and then was out of business until the fall of 1926. I began with the Interstate on November 12, 1926, and remained with it until January 15, of this year. I was manager and president all the time with the exception of a few months. I was general manager of both lines, also a director and stockholder, owning a substantial amount of the stock.

As manager I operated these lines to the best of my ability and gave them my exclusive time and attention. As to the schedules, I worked out most of them and then they were submitted to the other members of the company to act on. We made numbers and numbers of changes. The changes were minor ones and the schedules were fair. My previous operation of these two lines has given me special knowledge as to the travel over those lines and the requirements.

(Unprinted Transcript, 182.)

From Plaintiff's Exhibit No. 1.

Afternoon Session, Tuesday, March 13, 1928, Before the Public Utilities Commission of Ohio, Pages 35 to 41, Both Inclusive.

Afternoon Session, Tuesday, March 13, 1928.

Mr. Blair: Is the commission ready to proceed?

Chairman Klinger: Yes.

Mr. Blair: May it please your Honors, as we understand, the commission is holding that you have no jurisdiction or authority to consider any evidence tending to prove the good faith of the applicant, of his conduct heretofore, and of his ability financially to operate, of the necessity or convenience of the operation or any of these matters; that is our understanding of the holding of the commission; not that you are not willing to do it, but that you do not have the jurisdiction to do it on the ground that it is for interstate transportation solely.

Chairman Klinger: It is a little broader than you have been stating it. You can inquire as to his financial ability.

Mr. Blair: Otherwise the statement is correct, is it?

Chairman Klinger: Yes.

Mr. Blair: Then, may it please your Honors, we realize the seriousness of the questions raised. We would like to have the commission hold any order up for, say, four or five days and we will make the proper application to the proper court where these questions can be properly taken care of. We do not want the commission to make an order prior to that time so that the court may come

back and say that the commission has exercised its discretion on (Unprinted Transcript, 183) these matters; and it will give us four or five days so that we can make the application, and we will make it.

Commissioner Maullar: No, we would not grant—it would not be upon our discretion; we will make the grant.

(Unprinted Transcript, 184.)

Chairman Klinger: Just a minute; my understanding of their position is this; they wish to bring an action, say in the federal court, to enjoin us from granting this certificate, they want to set up the reasons that they want that injunction granted, and then it will appear that we refused to consider those reasons on the theory that we are without jurisdiction.

Mr. Blair: That is it.

Chairman Klinger: And they want time enough so that they can get their proceeding started in the court so as to hold up the granting of the certificate. And of course we realize that they will have to give bond.

Mr. Carlisle: Bond for what?

Chairman Klinger: Any damage that may result to your client.

Mr. Carlisle: But we do not know in advance which way your Honors are going to rule officially.

Chairman Klinger: I understand, but they are anticipating that we will grant it because there is no reason why we should not.

Mr. Carlisle: Then why make it a moot case?

Chairman Klinger: Well, that was our thought, that we should grant it.

Mr. Blair: We may say we have the evidence here to show, as we think, the fact of there being no necessity or convenience for this operation; and further to show, that the applicant, while operating The Interstate Motor Transit Company, has in two different courts been enjoined from illegal and unwarranted acts, and those injunction suits are still pending, with temporary restraining orders still in force; one in West Virginia and one in Ohio; one in this county.

Mr. Carlisle: Those are against the company; not against this man at all.

(Unprinted Transcript, 186.)

Mr. Blair: We claim the application of the defendant is not made in good faith; that he is not financially able to carry on this transaction; that he has heretofore been engaged in getting these certificates and selling them and making money out of them, and that is his sole purpose in this case. We believe that the evidence that we have will show those facts.

Mr. Carlisle: If your Honor please, we absolutely deny that.

Mr. Blair: Just a minute; that the records of The Interstate Motor Transit Company operated by him show that from July, 1927, until December, 1927, there was a gradual losing of patronage in that the passengers and the earnings of the bus company from its operation gradually decreased, although in the latter part of September or the first of October, under an order made by this commission, it was permitted to go to South Portsmouth, where it increased its income something like $3000.00 a

month, and notwithstanding that the income from July, 1927, to December, 1927, dropped from nineteen thousand and some dollars per month to fifteen thousand and some dollars.

Chairman Klinger: I do not know as it would make any difference.

Mr. Blair: I am only making the statement, and we will get the petition up promptly.

(Unprinted Transcript, 187.)

Chairman Klinger: I don't know as we are justified in modifying or changing our method of procedure here for either the advantage or disadvantage of any of the parties that may appear before us.

In a situation of this kind it has been the practice of this commission to make our order at once, to go into effect on a definite date in the future. We are willing to do that, to make our order today to go into effect the first day of April, if that is necessary, or the fifteenth of this month—say the first of April.

Commissioner Maullar: That would make the applicant here, if granted a certificate, pay for three-quarters of the year. If it becomes effective today he would be in for a full year's time.

Mr. Blair: Well, will that order contain the statement then that it is made on the theory that you have no right to pass on these matters?

Chairman Klinger: No. The order is just made on the record before us, put in here on both sides. We grant him a certificate to engage in interstate service as prayed for to become effective the first of April.

Mr. Blair: Well, we understand that the granting of it is on the proposition that you have no jurisdiction in the matter?

Chairman Klinger: We have stated, and we will now state, that we will not permit the introduction of evidence along that line for the reason that we have no jurisdiction. That will take care of your matters fully.

Mr. Blair: All right.

(Unprinted Transcript, 188.)

Plaintiff's Exhibit "8."

Portsmouth, Ohio, January 16, 1928.

Mr. Arthur Bannon,
Mr. Chas. M. Ault,
Portsmouth, Ohio.

Gentlemen:

As I have resigned as gen. mgr. of the Cannon Ball Transportation Co. and The Inter State Motor Transit Co.

I still remain president of the above companies and would like to resign the above office as president of both the companies and would like to do this as early as posibaly.

But so long as I fill this office I will fullfil the office as you have me to and continue on the payroll as set out in the by-laws of the above company which the salery of the president of the Inter State salery $2500.00, president of the Cannon Ball $1800.00 per year makeing a total of $4300.00 per year.

Also just as soon as Mr. Smith of The Inter State and

Mr. Taylor of the Cannon Ball have their books closed for the year 1927. I will go over with them and make good dollar for dollar the shortages which may not check out. Also settle eny differences between my drawing account and salerys and the cash which I have loaned and takeing credit for from the companies.

I will be on hand at eny time you can relive me from the office as president of the above companies.

Also to go over and check up 1927 business with Mr. Smith and Taylor and take care of eny shortages which is not accounted for for 1927 business.

Yours verry truly

(Copy) Jas. P. Grubb.

(Unprinted Transcript, 192.)

Plaintiff's Exhibit "12."

Blair & Ball

Portsmouth, Ohio

July 29, 1927.

Public Utilities Commission,
Columbus, Ohio.

Attention: Mr. Huffman.

Gentlemen:

We have heretofore conferred with you in reference to the extending of the Interstate Motor Transit Company's line so as to cross the river at Portsmouth, Ohio, to South Portsmouth, Kentucky, and return. It was then understood that we were to delay application for this extension until the bridge now being constructed across the Ohio river between Portsmouth, Ohio, and Fullerton, Kentucky, was completed and ready for travel. The bridge will be completed very shortly.

We are calling your attention to the case of the Cannon Ball Transportation Company application to extend its line from Park and Second streets in Ironton, Ohio, to the state line between Ohio and Kentucky, which application was filed in your office January 2, 1925, and denied by the commission on the ground of its not having jurisdiction over the part covered by the extension, the same being entirely within the municipal corporation of Ironton. The Cannon Ball Company prosecuted error to the Supreme Court, being Cause Number 19328 in said court, and was denied December 15, 1925, 113 Ohio State, page 677, the syllabus of which is as follows:

"Where an Ohio municipality is located upon the geographical border of the state, and a motor transportation company desires to operate a motor service from a point within such city to such geographical border, the regulation of such service within such municipality rests with the municipal authorities, and the Public Utilities Commission has no jurisdiction to entertain an application for a certificate of convenience and necessity."

Under the holding in this case and the facts in the extension contemplated as above set forth, it is suggested to us that your commission will have no jurisdiction to make an order in reference thereto.

Will you kindly take the matter up and advise us by early mail. If, for any reason, the matter should be directed to your commission, we desire to do so, but we wish to avoid the expense to our clients in both time and money in doing the vain thing.

Very truly yours,

Blair and Ball, Attorneys.

Per Albian and Blair.

(Unprinted Transcript, 194.)

Plaintiff's Exhibit "13."

Copy.

August 1, 1927.

Blair & Ball,
Attorneys at Law,
First National Bank Bldg.,
Portsmouth, Ohio.

Att.: A. Z. Blair.

Gentlemen:

Replying to your communication of July 29th, relative to an extension of the Interstate Motor Transit Company lines, across the Ohio river at Portsmouth, beg to advise that insofar as the commission has been informed, it finds that this operation is within the jurisdiction of the Public Utilities Commission.

Should this proposed operation be only to the Ohio-Kentucky state line, and entirely within the city of Portsmouth and not an extension of the existing route, the commission is of the opinion that it does not have jurisdiction. However, if the proposed operation extends across the state line and the operation becomes interstate, the commission is of the opinion that it does have jurisdiction.

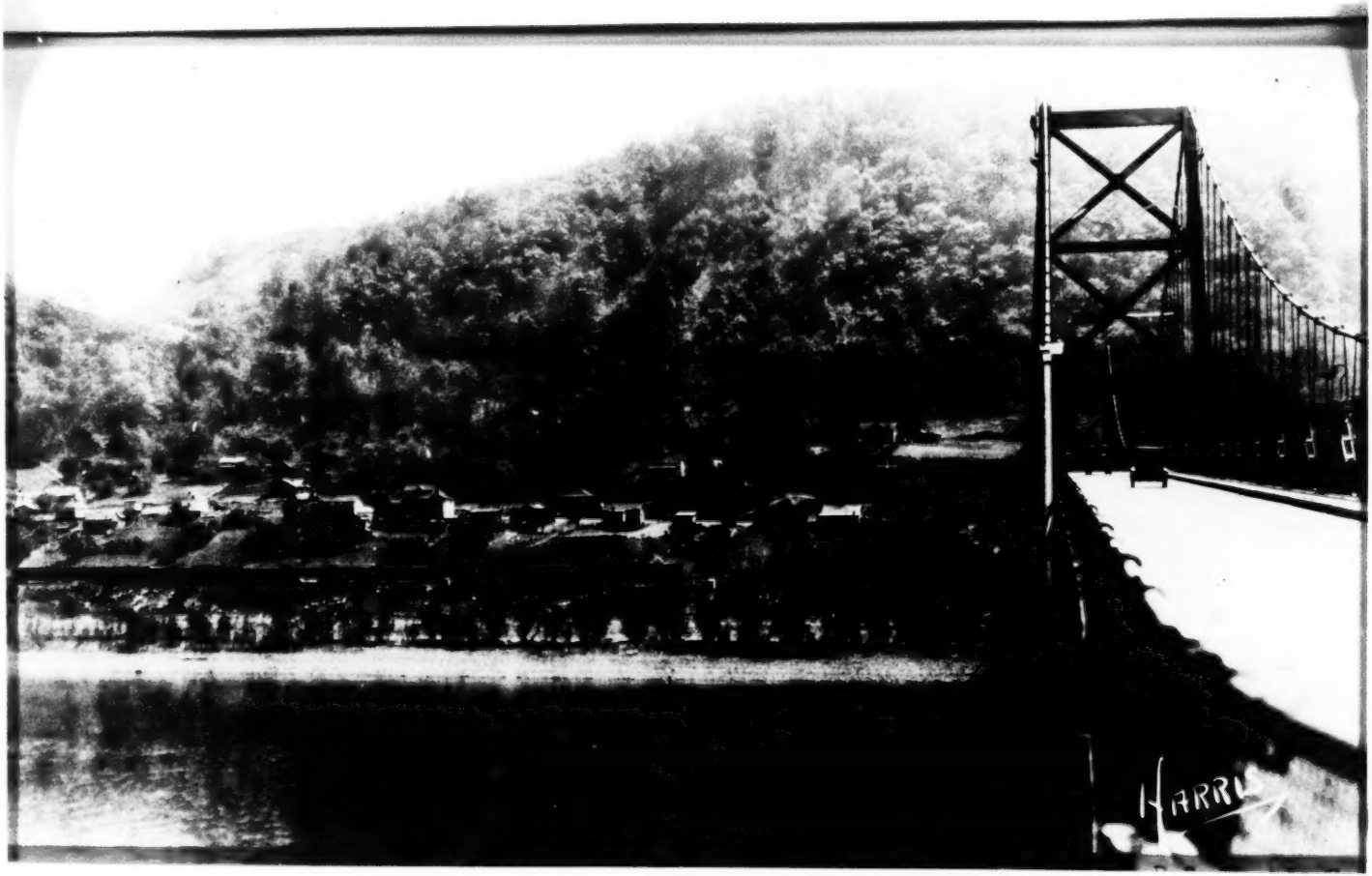
Should there be an attempt on the part of the Interstate Motor Transit Company to add buses to its equipment for the purpose of interstate operation, there is no doubt concerning the authority of the commission.

I would advise you to submit this case to the commission on its merits upon application and the commission will then decide if the case should be set for hearing.

Sincerely yours,
The Public Utilities Commission of Ohio.
Commissioner.

JWH:RC

(Unprinted Transcript, 195.)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Plaintiff's Exhibit "O."

Finding and Order.

This day after full hearing, due notice of the time and place of which was given by publication and otherwise as provided by law, this matter came on for consideration upon the application of the said The Interstate Motor Transit Company to amend certificate of public convenience and necessity to operate a motor transportation company, carrying as a common carrier, in the city of Portsmouth over the regular route following, to-wit:

To amend the route covered in its Certificate Number 2381, issued on the ninth day of June, 1925, by the Public Utilities Commission of Ohio, for busses traveling south, by extending and changing that part of said route beginning at the north corporation line of the city of Portsmouth, being the north terminus of Chillicothe street in said city; thence with said Chillicothe street south to the north end of the Portsmouth, Ohio-South Portsmouth, Kentucky, bridge across the Ohio river; thence over said bridge to the south line of said city of Portsmouth, being the line between the states of Ohio and Kentucky; thence continuing over said bridge and to the bus terminal at South Portsmouth, Kentucky. Returning over said bridge from Kentucky to the line of the state of Ohio and Kentucky, being the south line of said city of Portsmouth; thence over said bridge to Second street; thence west on Second street to Washington street; thence north on Washington street to Fifth street to its intersection with Chillicothe and Gallia streets; thence east to the

east corporation line of said city of Portsmouth, Ohio, over its present route.

And for busses traveling north, by extending and changing that part of said route beginning at the intersection of Gallia, Chillicothe and Fifth streets in the city of Portsmouth, Scioto county, Ohio; thence west on Fifth street to Washington street; thence south on Washington street to Second street; thence east on Second street to the north end of the Portsmouth, Ohio-South Portsmouth, Kentucky, bridge across the Ohio river; thence over said bridge to the south line of said city of Portsmouth, being the line between the states of Ohio and Kentucky; thence continuing over said bridge and to the bus terminal at South Portsmouth, Kentucky. Returning over said bridge from Kentucky to the line of the states of Ohio and Kentucky; being the south line of said city of Portsmouth; thence over said bridge to Second street; thence west on Second street to Washington street; thence north on Washington street to Fifth street; thence east on Fifth street to bus station; thence west on Fifth street to Washington street; thence north on Washington street to Ninth street; thence east on Ninth street to Chillicothe street; thence north on Chillicothe street, over present route.

Said amendment and alteration of said route as amended and as existing being entirely located in the city of Portsmouth, Scioto county, Ohio, insofar as it affects its route in the state of Ohio.

Granted for interstate operation only.

Dated at Columbus, Ohio, this twenty-first day of September, 1927.

(Unprinted Transcript, 213.)

Plaintiff's Exhibit A-1.

Sec. 614-2. The following words and phrases used in this chapter unless the same is inconsistent with the text, shall be construed as follows:

The term "commission" when used in this act, or in chapter one, division two, title three, part first of the General Code and the acts amendatory or supplementary thereto means "the Public Utilities Commission of Ohio."

The term "commissioner" means one of the members of such commission.

When engaged in the business of carrying and transporting persons or property, or both as a common carrier, for hire, in motor propelled vehicles of any kind whatsoever, under private contract or for the public in general, over any public street, road or highway in this state, except as otherwise provided in Section 614-84, is a motor transportation company;

Sec. 614-2a. The term "public utility" as used in this act, shall mean and include every corporation, company, co-partnership, person or association, their lessees, trustees or receivers, defined in the next preceding section, except private contract carriers and except such public utilities as operate their utilities not for profit, and except such public utilities as are, or may hereafter be owned or operated by any municipality, and except such utilities as are defined as "railroads" in Sections 501 and 502 of the General Code, and these terms shall apply in defining "public utilities" and "railroads" wherever used in chapter one, division two, title three, part first of the

General Code and the acts amendatory or supplementary thereto or in this act.

Sec. 614-67. Whenever the commission shall be of the opinion that any public utility or railroad has failed, omitted or neglected to obey any order made with respect thereto, or is about to fail or neglect so to do, or is permitting anything, or about to permit anything contrary to, or in violation of law, or an order of the commission, duly authorized under the provisions of this act, the attorney general, upon the request of the commission, shall commence and prosecute such action, actions, or proceedings in mandamus or by injunction in the name of the state, as may be directed by the commission, against such public utility or railroad, alleging the violation complained of and praying for proper relief, and in such case the court may make such order as may be proper in the premises.

Sec. 614-84. (a) The term "motor transportation company," when used in this chapter, means every corporation, company, association, joint stock association, person, firm or co-partnership, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any motor propelled vehicle not usually operated on or over rails, used in the business of transportation of persons or property, or both, as a common carrier, for hire, under private contract or for the public in general, over any public highway in this state; provided, however, that the term "motor transportation company" as used in this chapter shall not include any private contract carrier, as defined

in Section 614-2, and shall not include, any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated, in so far as they own, control, operate, or manage a motor vehicle or motor vehicles used for the transportation of persons or property, or both, and which are operated exclusively within the territorial limits of a municipal corporation, or within such limits and the territorial limits of municipal corporations immediately contiguous thereto, or in so far as they own, control, operate or manage taxicabs, hotel busses, school busses or sightseeing busses, or in so far as they own, control, operate or manage motor propelled vehicles, the use of which is for the private business of the owners and the use of which for hire is casual and disassociated from such private business.

Sec. 614-85. No motor transportation company, its lessees, trustees, receivers or trustees appointed by any court whatsoever, shall operate any motor propelled vehicle for the transportation of persons or property, or both, for hire, on any public highway in this state except in accordance with the provisions of this chapter.

Sec. 614-86. The Public Utilities Commission of the state of Ohio is hereby vested with power and authority to supervise and regulate each such motor transportation company in this state; to fix, alter and regulate rates; to regulate the service and safety of operation of each such motor transportation company; to prescribe safety regulations, and designate stops for service and safety on established routes; to require the filing of annual and

other reports and of other data by such motor transportation companies; to provide uniform accounting systems; and to supervise and regulate motor transportation companies in all other matters affecting the relationship between such companies and the public to the exclusion of all local authorities in this state, except as hereinafter otherwise provided. The commission, in the exercise of the jurisdiction conferred upon it by this chapter, shall have the power and authority to prescribe rules and regulations affecting such motor transportation companies, notwithstanding the provisions of any ordinance, resolution, license or permit heretofore enacted, adopted or granted by any incorporated city or village, city and county, or county, and in case of conflict between any such ordinance, resolution, license or permit, the order, rule or regulation of the Public Utilities Commission shall, in each instance prevail; provided that such local subdivisions may make reasonable local police regulations within their respective boundaries, not inconsistent with the provisions of this chapter; provided, further, that no motor transportation company operating under a certificate of convenience and necessity, shall carry persons whose complete ride is wholly within the territorial limits of a municipal corporation, or within such limits and the territorial limits of municipal corporations immediately contiguous thereto, except with the consent of such municipal corporation or municipal corporations.

Sec. 614-89. In all respects in which the Public Utilities Commission has power or authority under this act applications and complaints may be made and filed with

such commission, processes issued, hearings held, opinions, orders and decisions made and filed, petitions or re-hearings filed and acted upon, **and all proceedings before the Supreme Court of this state considered and disposed of by such court in the manner, under the conditions and subject to the limitations and with the effect specified in the sections of the General Code governing the supervision of other public utilities by the commission.**

Sec. 614-100. Every officer, agent or employe of any corporation, and every other person who violates or fails to comply with or who procures, aids or abets in the violation of any provision of Sections 614-84 to 614-102, inclusive, of the General Code, or who fails to obey, observe or comply with any order, decision, rule or regulation, direction, demand or requirement, or any part or provision thereof, of the Public Utilities Commission, or who procures, aids or abets any corporation or person in his failure to obey, observe or comply with any such order, decision, demand or regulation, or any part or provision thereof, shall be deemed guilty of a misdemeanor and, upon conviction, shall be punished by a fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

Sec. 614-101. Neither Sections 614-84 to 614-102, inclusive, of the General Code, nor any provisions thereof, shall apply or be construed to apply to commerce with foreign nations or countries, or among the several states of this Union, except in so far as the same may be permitted under the provisions of the Constitution of the United States and the acts of congress.

(Unprinted Transcript, 214.)

Plaintiff's Exhibit A-2.

Section 2. Article IV, of the Constitution of the State of Ohio.

Sec. 2. The Supreme Court shall, until otherwise provided by law, consist of a chief justice and six judges now in office in that court shall continue therein until the end of the terms for which they were respectively elected, unless they are removed, die or resign. A majority of the Supreme Court shall be necessary to constitute a quorum or to pronounce a decision, except as hereinafter provided. It shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in all cases involving questions arising under the Constitution of the United States or of this state, in cases of felony on leave first obtained, and in cases which originated in the courts of appeals, and **such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law.** It shall hold at least one term in each year at the seat of government, and such other terms, there or elsewhere, as may be provided by law. The judges of the Supreme Court shall be elected by the electors of the state at large for such term, not less than six years, as may be prescribed by law, and they shall be elected, and their official term shall begin, at such time as may now or hereafter be fixed by law. Whenever the judges of the Supreme Court shall be equally divided in opinion as to the merits of any case before them and are unable

for that reason to agree upon a judgment, that fact shall be entered upon the record and such entry shall be held to constitute an affirmance of the judgment of the court below. No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional and void. In cases of public or great general interest the Supreme Court may, within such limitation of time as may be prescribed by law, direct any Court of Appeals to certify its record to the Supreme Court, and may review and affirm, modify or reverse, the judgment of the Court of Appeals. All cases pending in the Supreme Court at the time of the adoption of this amendment by the people, shall proceed to judgment in the manner provided by existing law. No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the Supreme Court. (Adopted September 3, 1912.) **(Boldface ours.)**

Sec. 502. This chapter shall apply to the transportation of passengers and property **between points within this state**, to the receiving, switching, delivering, storing and handling of such property, and to all charges connected therewith, including icing charges and mileage charges, to all railroad companies, sleeping car companies, equipment companies, express companies, car companies, freight and freight line companies, to all associations of persons, whether incorporated or otherwise, which do business as common carriers, upon or over a

line of railroad within this state, and to a common carrier engaged in the transportation of passengers or property wholly by rail or partly by rail and partly by water or wholly by water. In addition thereto the provisions of this act shall apply to the regulation of any and all other duties, services, practices and charges, of the railroad company, incident to the shipping and receiving of freight, which are proper subjects of regulation, **excepting only, that they shall not apply to the regulation of commerce with foreign nations, and among the several states, and with the Indian tribes.**

(Unprinted Transcript, 215.)

Stipulations as to Blue Print for Printed Record.

In lieu of the road maps marked in the transcript as Plaintiff's Exhibit "C", it is hereby stipulated by counsel for appellant and appellees that a blue print sketch map showing the part of the route granted and the part of the route prohibited be made and included within the printed record by the clerk of the Supreme Court of the United States, and the same be designated in the designations of the appellant.

It is further stipulated that said blue print map be substituted for said road map and be marked as Plaintiff's Exhibit "C" in said printed record.

It is further stipulated that said blue print map be

and the same is hereby approved by counsel for appellant and appellees.

.....

The Portsmouth Public Service Company by Miller & Searl its attorneys.

The Ohio Valley Bus Company by A. R. Johnson its attorney.

The Ohio Valley Electric Railway Company by A. R. Johnson its attorney.

The Interstate Motor Transit Company by D. H. Armstrong and Blair & Ball its attorneys.

The Cannonball Transportation Company by D. H. Armstrong and Blair & Ball its attorneys.

The Public Utilities Commission of Ohio by T. J. Herbert, attorney.

J. P. Grubb, appellant by John F. Carlisle and F. M. Raymund, attorneys.

(Unprinted Transcript, 219.)

Plaintiff's Exhibit "H."

A certificate of public convenience and necessity is hereby granted J. P. Grubb db/as The Tri-State Transit Company a motor transportation company under the laws of Ohio, whose office or place of business is at Portsmouth, Ohio, to operate over the route and by the schedules heretofore approved by this commission, or which may hereafter be approved by this commission, said route being as follows:

Leave Columbus, Ohio, from terminal located on East Rich street, thence via Rich street to South Third street;

thence to Whittier street; thence to High street; thence to corporation line; thence via United States Highway No. 23 to the county line of Franklin and Pickaway counties; thence via same highway to and through South Bloomfield and Circleville to the county line of Pickaway and Ross counties; thence via the same highway to and through Hopetown to the corporate line of Chillicothe; thence via Bridge street to Water street; thence to Paint street and thence to corporate line; thence via United States Highway No. 23 to and through Massieville and Alma to the county line of Ross and Pike counties; thence via same highway to and through Waverly, Piketon, Sargents and Wakefield to the county line of Pike and Scioto counties; thence via same highway to and through Portsmouth and New Boston and, via United States Highway No. 52 to and through Wheelersburg,, Franklin Furnace and Haverhill to the county line of Scioto and Lawrence counties; thence via same highway (which is also State Route No. 7) to and through Hanging Rock to the corporation line of Ironton; thence via Second street to bridge, crossing river to Russell, Kentucky (final destination, Huntington, West Virginia), and reverse.

Granted for interstate operation only.

Conditioned that local subdivisions may make reasonable local police regulations within their respective boundaries not inconsistent with the provisions of Sections 614-84 to 614-102 of the General Code of Ohio.

and with the following equipment: Eight 17 passenger Studebakers.

Said J. P. Grubb db/as The Tri-State Transit Com-

pany shall so operate upon the time and rate schedules now or hereafter filed with and approved by this commission and displayed at the stations, and in each motor bus of said company.

Witness the signature and seal of the commission at Columbus, Ohio, this second day of April, 1928.

(Unprinted Transcript, 228.)

Plaintiff's Exhibit "I."

Department of Treasurer of State.

P. U. C. O. No. 2840.

To the Public Utilities Commission:

Received from J. P. Grubb db/as The Tri-State Transit Co..... $840.00

Portsmouth, Ohio

to the credit of the fund for the administration of the provisions of Sections 614-84 to 614-102 G. C. and for the maintenance and repair of highways in accordance with Section 614-94 G. C.

Date ....., 192... Cashier.

Tax computed from April 1, 1928.

Received April 23, 1928.

Ohio State Treasury.

Plaintiff's Exhibit "J-1."

Department of Motor Transportation
Office of the Commissioner
Frankfort, Kentucky

January 23, 1928.

Mr. James P. Grubb,
Portsmouth, Ohio
Dear Sir:

Replying to your letter of January twentieth, in regard to interstate bus line from Columbus, Ohio to Huntington, West Virginia, please be advised that the only thing necessary in securing an interstate line is to comply with the state law by paying all fees required by the state. If this is done, the commissioner has no discretion in the matter but must grant interstate permits.

Please fill out the enclosed blank and return to this office. Upon receipt of this a date will be set immediately for a hearing of the same and you will be notified.

You must comply with the law by notifying all parties operating over said route or any steam or electric railway paralleling same, that you have filed application. All notices must be by registered mail and a copy of each notice filed with this department.

Yours very truly,
Signed "Griffin Kelly"
Commissioner.

(Unprinted Transcript 229.)

Plaintiff's Exhibit "J-2."

Department of Motor Transportation
Office of the Commissioner
Frankfort, Kentucky

January 30, 1928.

Mr. James P. Grubb, Manager,
Tri-State Transit Company,
2309 Mickleweight Road,
Portsmouth, Ohio

Dear Sir:

Enclosed please find interstate permit No. 2204.

Just as soon as possible kindly send us description of the cars together with motor numbers, &c., and check to cover same.

Yours very truly,
Signed: "Griffin Kelly"
Commissioner.

Plaintiff's Exhibit "J-3."

Commonwealth of Kentucky
Department of Motor Transportation
1928
Interstate Passengers Only

Permit No. 2204

Frankfort, Ky., January 30, 1928.

Tri-State Transit Company (James P. Grubb, manager) having complied with the laws and regulations of the commissioner, a certificate of convenience and necessity to operate a motor bus line is hereby granted to said company from Huntington, West Virginia to Columbus,

Ohio; via Kenova, W. Va.; Catlettsburg, Ky.; Ashland, Ky.; Ironton, Ohio; Portsmouth, Ohio; to South Portsmouth, Ky. to Portsmouth, Ohio; to Columbus, Ohio, through the following counties: Boyd and Greenup county, Kentucky.

Said operation to begin immediately.

Said bus line is authorized to use a sufficient number of busses of the proper seating capacity to maintain the schedule as outlined on the reverse side of this certificate. If said operation is not started within sixty (60) days, (the time specified by law) from date said operation is specified to begin in this certificate, same shall become null and void.

Signed: "Griffin Kelly"
[Seal.] Commissioner of Motor Transportation.

(Unprinted Transcript, 230.)

Plaintiff's Exhibit "J-4."

Schedule

Leave Arrive Fare

As per printed schedule attached.

This schedule is subject to change by the commissioner of motor transportation of the state of Kentucky if it conflicts with any other schedule over the same route. The within permit is granted to handle interstate passengers only, and any violation of this provision will automatically revoke this permit.

Signed: "Griffin Kelly"
Commissioner.

Plaintiff's Exhibit "J-5."

Department of Motor Transportation
Office of the Commissioner
Frankfort, Kentucky

March 12, 1928.

Mr. James P. Grubb
Portsmouth, Ohio
Dear Sir:

Replying to your letter of March tenth, in which you request that the time to begin operation on permit No. 2204 be extended twenty days, you will please be advised that you are hereby granted an extension of time until April twentieth.

Yours very truly
Signed: "Griffin Kelly"
Commissioner.

Plaintiff's Exhibit "J-6."

April 2nd, 1928.

Mr. James P. Grubb, Mgr.
Tri-State Transit Company
Portsmouth, Ohio.
Dear Sir:

You are hereby notified that I have today revoked your inter-state Permit No. 2204 to operate a motor bus line between Huntington, West Virginia and Columbus, Ohio via Catlettsburg, Ashland, and Russell, Kentucky, for failure to operate within sixty (60) days after the permit was granted, as provided in Section 5, Chapter 112 of the acts of the 1926 general assembly.

You are further advised that if you attempt to operate through Kentucky without a permit from this Department that you will be prosecuted and subject to a fine of from $10.00 to $100.00 for each day you operate without a permit.

I am notifying the Public Utilities Commission of Ohio and West Virginia today that your Kentucky permit has been revoked.

Very truly yours,
Signed: "Griffin Kelly"
Commissioner.

(Unprinted Transcript, 231.)

Plaintiff's Exhibit "J-7."

Telegram

Charleston, W. Va., April 3rd, 1928.

To Department of Motor Transportation
Att, Mr. Griffin Kelly.
Frankfort, Ky.

Received letter today read to me by phone from home saying you had revoked certificate because sixty days time had passed and operation had not begun.

Your letter March twelfth extending time to April twentieth account other delays. Advise me by wire to Portsmouth Ohio.

J. P. Grubb.

Plaintiff's Exhibit "J-8."

Telegram

Frankfort, Ky. Apr 3, 1928 (85)

809 Seventh St. Phone 231.

James P. Grubb
Portsmouth, Ohio

If you have letter extending time of operation until April twentieth the order revoking your permit will be rescinded.

Griffin Kelly.

Plaintiff's Exhibit "J-9."

Telegram

Frankfort, Ky. 115A
Apr 17 1928

James P. Grubb
Portsmouth, Ohio

Time extended to begin operating under permit 2204 until April 25.

Griffin Comr
1240P

(Unprinted Transcript, 232.)

Plaintiff's Exhibit "K-1."

State of Kentucky

1928 Registration B 381
Bus Certificate Date 4/21 1928.

Received of Tri-State Transit Co. Portsmouth, Ohio, one hundred and eighty-five and 14/100 dollars $185.14 in payment of state fees for registration of the following described bus for the year 1928:

Make of chassis Studebaker. Make of body ..... Year made 1928, Model 76, Gross weight 8270 lbs. Seating capacity 17. Motive power, gas. Chassis No. 3250591. Motor No. BA-605. Last registered by present owner in the county of ..... state of ..... for year ..... Registration No. ....., or if not previously registered from whom procured: Name Scioto County Motor Co. Address 1622 Gallie St., Portsmouth, O. Date procured 4/20, 1928. Permit 2204.

Signed: "Griffin Kelly"
Commissioner of Motor Transportation.
By "J. E. Cantrill"
Assistant Commissioner.

Note—Seven (7) duplicate receipts all bearing date of April 21, 1928, only differing from the one above given by giving different descriptions of the seven busses, all of which may be found on pages 233, 234, 235, and 236, of the unprinted transcript on file in the clerk's office and identified on said transcript as Plaintiff's Exhibits "K-1", "K-2", "K-3", "K-4", "K-5", "K-6", "K-7", and "K-8."

(Unprinted Transcript 233.)

Plaintiff's Exhibit "M."

Copy

April 13, 1928

In Re: Application of James P. Grubb for a Certificate of Convenience for Operation Over a Regular Route Between Huntington and the Kentucky Line at Kenova.	Before the State Road Commission of West Virginia. Docket No. 1030 Certificate No. 194.

This cause came on to be heard upon application regularly filed, upon notice published as required by this commission, upon protests of the Chesapeake and Ohio Railway Company, the Ohio Valley Electric Railway Company, the Ohio Valley Bus Company, the Interstate Motor Transit Company and the Cannonball Transportation Company, upon testimony produced on behalf of the applicant and the protestants, and upon all other papers formally filed herein, all of which are hereby made a part of the record in this cause, and upon consideration of all of which it is this thirteenth day of April, 1928,

Ordered, that the application of James P. Grubb for a certificate of convenience for operation of motor vehicles for interstate transportation of passengers for compensation over a regular route between Huntington, in Cabell county, and the Kentucky state line at Kenova, in Wayne county, over certain streets and State Route No. 3 (United States Highway No. 60) as designated and described on the map or maps filed with this commission, be, and the same is hereby, granted, the said certificate to be effective until the thirty-first day of December, 1929, unless sooner revoked for cause, subject, however,

to any provisions of law or of the rules and regulations of this commission which are now or which may hereafter become effective.

Ordered, that the said certificate is granted only for interstate transportation and the grantee herein, or its successors or assigns, shall not take on or receive passengers within the state of West Virginia to be discharged within the state of West Virginia.

The granting of the certificate of convenience herein is upon the express condition and understanding that it is not granted upon any showing made to or consideration or finding made by the state road commission of West Virginia that the privilege sought by the applicant is necessary or convenient for the public or that the service so proposed to be rendered by the applicant is not now being adequately performed by any person, firm or corporation, and that this certificate of convenience is, therefore, granted in conformity with the decisions of the United States Supreme Court rendered in the cases of A. J. Buck v. Kuykendall and George W. Bush and Sons Company v. William M. Maloy, et al., and is granted subject to any enlargement or abridgment of the authority of this commission concerning interstate motor vehicle operation arising from any decision of a federal court that may be rendered hereafter or from any law that may be enacted hereafter by the congress of the United States.

(Unprinted Transcript, 237.)

Plaintiff's Exhibit "N."

No. .....

Portsmouth, Ohio April 23 1928.

Pay to the order of State Road Commission W. Va. $387.30 three hundred eighty-seven 30/100 dollars road tax 1928.

The Ohio Valley Bank
Portsmouth, Ohio

Tri State Transit Co.
Jas. P. Grubb

(Unprinted Transcript, 238.)

Plaintiff's Exhibit "P."

December 23d, 1927.

Mr. Arthur Bannon,
Mr. Charles M. Ault,
Portsmouth, Ohio
Gentlemen:

I hereby wish to tender my resignation and connections, so far as my duties and services are concerned, with the Interstate Motor Transit Company and the Cannonball Transportation Company. I will continue with the above mentioned companies, under the supervision of you gentlemen, and will assist in any way you would have me until you can fill my place. I will endeavor to co-operate with you to my fullest extent during the time I am still with you, but will ask that you please relieve me from all duties as soon as possible. My time to remain with said companies not to be longer than January

15th, 1928. I would appreciate it very much if you would make arrangements to relieve me sooner.

Yours very truly,

Signed Jas. P. Grubb.

(Unprinted Transcript, 238.)

Plaintiff's Exhibit "Q."

Agreement

This agreement made and entered into this second day of February, 1928, by and between J. P. Grubb, A. H. Bannon, The Cannonball Transportation Company and The Inter-State Motor Transit Company, witnesseth:

That whereas, A. H. Bannon desires to purchase the stock in said two companies which is now owned by said J. P. Grubb for the sum of twenty thousand dollars ($20,000.00); and

Whereas in addition to said stock the said J. P. Grubb owns and holds certain promissory notes of said companies upon which suit has been filed in the Court of Common Pleas of Scioto county, Ohio, it is therefore agreed by and between all parties hereto that the sale of said stock by said Grubb to said Bannon shall in no way prejudice the rights of the holder of said notes, nor shall the purchase of said stock by said Bannon prejudice any rights of said companies; said notes and said stock being entirely separate transactions and securities and neither shall be deemed to depend on the other.

In witness whereof said parties have hereunto set their hands the day and year aforesaid.

Signed: "J. P. Grubb"

"Arthur H. Bannon"

The Cannonball Transportation Company,

Per "A. H. Bannon," President.

The Inter-State Motor Transit Company,

Per "A. H. Bannon," President.

(Unprinted Transcript, 239.)

Plaintiff's Exhibit "V."

Certificate of Public Convenience and Necessity.

(Sec. 614-88, G. C.)

A certificate of public convenience and necessity is hereby granted The Interstate Motor Transit Company a motor transportation company under the laws of Ohio, whose office or place of business is at Portsmouth, Ohio, to operate over the route and by the schedules heretofore approved by this commission, or which may hereafter be approved by this commission, said route being as follows:

Leave Columbus from Bus Terminal, located at 41 E. Rich St., thence via Rich to Third; thence via Third to Whittier; thence via Whittier to High; thence via High to the corporation line (returning in Columbus via High St. to Rich, thence to 41 E. Rich, Terminal) thence via the Scioto Trail (State Route No. 4) to the county line of Franklin-Pickaway counties; thence via same highway to and through the corporate limits of Circleville to the county line of Pickaway-Ross counties; thence via

same highway to the corporation line of Chillicothe; thence via continuation of Route No. 4 to Bridge St.; thence to Water; thence to Paint St. (thence to Warner hotel); thence via Paint St. to corporation line; thence via the Scioto Trail, State Route No. 4 to the county line of Ross and Pike counties and to and through the corporate limits of Waverly and Piketon to the county line of Pike and Scioto counties; thence via same highway to the corporation line of Portsmouth; thence via Chillicothe St. to Fifth; thence Fifth to Market; thence Market to Second (terminal); thence via Second to Chillicothe St.; thence via Chillicothe St. to Gallia St.; thence via Gallia to Eighth; thence via Eighth to and over viaduct to Gallia; thence via Gallia to Norfolk; thence to Walnut; thence to corporation line of New Boston; east on Rodes Ave. to Pine St.; thence to Gallia; thence east on Gallia to the corporation line of New Boston, which is also the corporation line of Portsmouth; thence east on Gallia to the corporation line of Portsmouth; thence via A. & P. Highway No. 7 to the county line of Scioto-Lawrence counties; thence via same highway to the corporation line of Ironton; thence via Second Street to terminal at Second and Park Sts.; thence via Second to the Ohio river bridge, crossing the bridge into the state of Kentucky—continuing via various highways, etc., through Kentucky and W. Virginia to Charleston, W. Va., end of line and return.

Granted for interstate operation only.

Conditioned, that local subdivisions may make reasonable local police regulations within their respective

boundaries not inconsistent with the provisions of Sections 614-84 to 614-102 of the General Code of Ohio.

Said The Interstate Motor Transit Company shall so operate upon the time and rate schedules now or hereafter filed with and approved by this commission and displayed at the stations, and in each motor bus of said company.

Witness the signature and seal of the commission at Columbus, Ohio, this ninth day of June, 1926.

(Unprinted Transcript, 240.)